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No. 08-

IN THE

Supreme Court of the United States

SUNGWOOK KIM,

Petitioner,

v.

ERIC H. HOLDER, JR.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1256(a) of Title 8, U.S. Code, imposes a five-year limitations period during which the Attorney General may rescind an alien's permanent resident status upon a finding that the alien was not eligible for the status at the time it was granted. The question presented is:

Whether the five-year limitations period of 8 U.S.C. § 1256(a) permits the government to initiate removal proceedings after the five-year period has passed based solely on the alien's ineligibility for permanent resident status at the time it was granted, where the final removal order rescinds the alien's permanent resident status.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE WRIT 13

I. The Circuits Are Split On Whether Section 1256(a)'s Limitations Period Applies To Removal Proceedings Based On Lack Of Eligibility To Have Obtained Lawful Permanent Resident Status. 13

II. Section 1256(a)'s Limitations Period Applies To Removal Proceedings Based On Lack Of Eligibility To Have Obtained Lawful Permanent Resident Status. 20

CONCLUSION 24

APPENDIX

Kim v. *Holder*,
560 F.3d 833 (8th Cir. 2009) 1a

Opinion of the Board of Immigration Appeals 14a

Decision of the Immigration Judge 21a

Relevant Provisions of the Immigration and Nationality Act 28a

TABLE OF AUTHORITIES

CASES

Page

Arellano-Garcia v. *Gonzales*,
429 F.3d 1183 (8th Cir. 2005) 18

Asika v. *Ashcroft*,
362 F.3d 264 (4th Cir. 2004) 11, 13, 16, 21

Bamidele v. *INS*,
99 F.3d 557 (3d Cir. 1996) ..... *passim*

Biggs v. *INS*,
55 F.3d 1398 (9th Cir. 1995) 16, 21

Cardenas-Mendoza v. *Holder*, 2009 U.S. App.
LEXIS 5919 (9th Cir. Mar. 20, 2009) 18

Chevron, U.S.A., Inc. v. *Natural Res. Def.*
Council, Inc., 467 U.S. 837 (1984) 12, 14

Choe v. *INS*, 11 F.3d 925 (9th Cir. 1993) 19

De Guzman v. *Att'y Gen. of the United States*,
263 Fed. Appx. 222 (3d Cir. 2008) 18

Dion v. *Sec'y of Health & Human Servs.*,
823 F.2d 669 (1st Cir. 1987) 14

Garcia v. *Att'y Gen. of the United States*,
553 F.3d 724 (3d Cir. 2009) ..... *passim*

Iavorski v. *INS*,
232 F.3d 124 (2d Cir. 2000) 17

In re Koloamatangi,
23 I. & N. Dec. 548 (B.I.A. 2003) 11

Kim v. *Ashcroft*,
95 Fed. Appx. 418 (3d Cir. 2004) 18

Lopez-Avalos v. *Mukasey*,
273 Fed. Appx. 684 (9th Cir. 2008) 18

Matter of S--, 9 I. & N. Dec. 548
(Att'y Gen. 1962) 12, 21, 22

Monet v. *INS*, 791 F.2d 752 (9th Cir. 1986) 16

Oloteo v. *INS*, 643 F.2d 679 (9th Cir. 1981) 16

Omar v. *INS*,
266 Fed. Appx. 37 (2d Cir. 2008) 18

Sanchez v. *Winfrey*,
134 Fed. Appx. 720 (5th Cir. 2005) 18

Savoury v. *United States Att'y Gen.*,
449 F.3d 1307 (11th Cir. 2006) 18

Tinoco-Garcia v. *Gonzales*,
227 Fed. Appx. 615 (9th Cir. 2007) 18

Valente-Narcizo v. *Gonzales*,
139 Fed. Appx. 878 (9th Cir. 2005) 18

STATUTES & REGULATORY MATERIALS

8 U.S.C. § 1101 6

8 U.S.C. § 1182 ..... 5, 9, 10

8 U.S.C. § 1229b 6

8 U.S.C. § 1256 ..... *passim*

8 C.F.R. § 235.3 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sungwook Kim respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit's decision exacerbates a split in authority among the courts of appeals on an important and recurring immigration question. The Third Circuit has held that under the Immigration and Nationality Act's five-year limitations period for rescission of an alien's permanent resident status for lack of initial eligibility, the government may not bring removal proceedings after the five-year period has elapsed against a permanent resident based on such ineligibility. 8 U.S.C. § 1256(a). The Eighth Circuit held, in accord with two other circuits, that the limitations period applies only to rescission actions and not removal actions, even though "an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status." *Id.* Certiorari should be granted to resolve the split in the circuits.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-13a, is reported at 560 F.3d 833. The opinion of the Bureau of Immigration Appeals, App., *infra*, 14a-20a, and the decision of the Immigration Judge, App., *infra*, 21a-27a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2009. App., *infra*, 1a. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1256(a) of Title 8, U.S. Code states:

> If, at any time within five years after the status of a person has been otherwise adjusted . . . to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

STATEMENT

This case presents an important and recurring question upon which the federal courts of appeals are divided: Whether a lawful permanent resident may be stripped of his permanent resident status in removal proceedings brought after the statutory five-year limitations period for rescission of permanent resident status has run, where the basis for the removal is the same as the time-barred basis for rescission.

Petitioner Sungwook Kim, a native citizen of South Korea, entered the United States in 1998 at the age of 18 on an F-1 student visa. App. 2a. In 1992, after completing his bachelor's degree in the United States, Mr. Kim applied to become a lawful permanent resident. *Id.* Mr. Kim had been hired by a company in San Jose, California that agreed to sponsor his application for permanent resident status. C.A. App. 153. He was to work for the San Jose company doing translations to and from Korean, which he could do from his home in the St. Louis area. *Id.* at 153-54. At his employer's direction, he went to San Jose, California to fill out the required paperwork to adjust his status. App. 2a.

Mr. Kim provided his employer with copies of his educational records and other documents his employer requested. C.A. App. 161-62. In San Jose, he met with two men he believed were attorneys, and signed numerous copies of several different forms. *Id.* at 155-56, 162-63. He was told that the legal fees for the application process would be $10,000, of which $2,000 was paid in San Jose and the

remainder was to be withheld from his paychecks. App. 2a. Mr. Kim was approved for lawful permanent resident status in August, 1992. *Id.* at 2a, 25a.

Mr. Kim subsequently earned a Masters of Business Administration from St. Louis University and a Masters of Finance at the University of Illinois. App. 24a. Mr. Kim has lived and worked in the United States during the 17 years since he was granted lawful permanent resident status. He has never been convicted of any crime. Mr. Kim has a two-year old son, who is a U.S. citizen.

Until 2003, Mr. Kim traveled to South Korea once a year to visit family. App. 2a. After each visit, Mr. Kim returned to the United States and was permitted to enter the country with his Korean passport and his permanent resident card. C.A. App. 166-68. On March 4, 2003, nearly 11 years after he was first granted lawful permanent resident status, Mr. Kim returned to the United States from one such trip abroad. App. 2a. Unlike his previous trips, however, on this occasion Mr. Kim was interviewed and detained by agents of the Immigration and Naturalization Service.[1] *Id.* The agents told Mr. Kim that his permanent resident card was improperly issued and was not valid. Mr. Kim believed there was some mistake. C.A. App. 168.

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[1] The functions of the INS are now included within the Department of Homeland Security.

The government's charges stemmed from a criminal matter, five years earlier, involving an INS officer, Leland Sustaire. App. 3a. Sustaire was a Supervisory District Adjudication Officer for the INS's San Jose California office in 1992, when Mr. Kim's application was approved. *Id.* In 1998, Sustaire admitted to accepting bribes in exchange for issuing green cards. *Id.* The government alleged that Mr. Kim's permanent resident card was issued based on an insufficient immigration record because of a bribe to Sustaire. *Id.*

Mr. Kim was permitted to enter the United States but was later served with a Notice To Appear charging that his permanent resident card was issued based on a "legally and factually baseless" immigration record. App. 3a. The government stated in the notice that Mr. Kim had arrived "as a returning resident alien," but because his permanent resident card was allegedly invalid, the government charged him as an arriving *non-resident* alien. C.A. App. 617, 622. The government charged that Mr. Kim was subject to removal based on three grounds of inadmissibility: (1) that he was an "alien present in the United States without being admitted or paroled" under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i); (2) that he was an immigrant who is applying for admission without a valid travel document under INA § 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I); and (3) that he was an alien who seeks or has sought an immigration benefit by fraud or willful misrepresentation," INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i). App. 2a-3a; 14a.

Mr. Kim denied the government's charges that he was inadmissible or removable. Mr. Kim also argued that he was not subject to removal based on grounds of inadmissibility: Because Mr. Kim was in possession of a valid permanent resident card, he was entitled to the presumption that he was a returning resident, rather than an arriving non-resident alien seeking admission. 8 U.S.C. § 1101(a)(13)(C).[2] As a returning resident, Mr. Kim could only be deported if the government proved grounds of deportability, not grounds of inadmissibility. In the alternative to his arguments that he was not removable, Mr. Kim applied for cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a).

At Mr. Kim's hearing before the Immigration Judge, the government introduced several exhibits and offered the testimony of Officer Lesley Brown to connect Mr. Kim to Leland Sustaire, the corrupt INS officer. App. 3a. The exhibits included various materials from the criminal proceedings against Sustaire and others who were involved in the bribery case, such as the judgments obtained against Sustaire and other defendants, C.A. App. 348-72, a government motion submitted in the case that

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[2] Under 8 C.F.R. § 235.3(b)(5), if an arriving alien's claim to be a lawful permanent resident is verified through Homeland Security's data systems or otherwise, and that status has not been terminated, whether the individual is seeking admission the United States is determined under 8 U.S.C. § 1101(a)(13)(C). That section states that a lawful permanent resident "shall not be regarded as seeking an admission" unless one of six conditions applies, none of which were asserted by the government. 8 U.S.C. § 1101(a)(13)(C).

summarized the bribery scheme, C.A. App. 375-82, and a transcript of Sustaire's testimony, C.A. App. 389-517. Mr. Kim's name did not appear in any of these materials. *See* C.A. App. 348-517. Rather, his alien identification number allegedly appeared on a copy of a handwritten list of alien identification numbers that was purportedly introduced in Sustaire's trial and referred to in his testimony as a list of the aliens whose green cards he had issued illegally. App. 22a; C.A. App. 387.[3]

In addition to the evidence from the Sustaire criminal matter, the government offered an I-213 Record of Deportable/Inadmissible Alien, consisting mostly of the government's conclusions that Mr. Kim's adjustment of status was linked to the Sustaire bribery case. C.A. App. 346-47. The government also offered the testimony of Officer Brown, who testified that the government concluded that Mr. Kim's permanent resident card was issued illegally based on three factors: (1) the government was unable to locate Mr. Kim's file (and Sustaire said he had destroyed the files involved in his bribery case); (2) the government concluded that Mr. Kim did not qualify at that time for adjustment of status; and (3) Mr. Kim's number was on Sustaire's list. C.A. App. 123-149. Officer Brown's testimony was not

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[3] The list consists of five pages. C.A. App. 384-88. The first three pages contain case numbers with names and dates; the final two pages contain columns of numbers without names or dates. *Id.* Mr. Kim's case number 72 095 200 allegedly appears on the fourth page, but the entry could also be read as 72 098 200. *Id.* at 387.

based on personal knowledge of the Sustaire case, but on what she had learned from others who had interviewed Sustaire. *See id.* Officer Brown also testified about the normal requirements for adjustment of status, though she did not testify as to any knowledge of the procedures or requirements in effect at the San Jose office in 1992. *See id.* Mr. Kim's objections to this evidence—on hearsay, lack of foundation, and relevance grounds—were overruled. App. 3a.

1. **The Immigration Judge's Decision.** The Immigration Judge credited Officer Brown's testimony that in order to get the employment-based lawful permanent resident card Mr. Kim received, a labor certification, medical certificate, and copies of the applicant's degrees were required to be submitted. App. 22a-23a. The Immigration Judge acknowledged that Mr. Kim's file from 1992 was not available, but nevertheless relied on the fact that Mr. Kim had not presented evidence of these materials from his application. App. 22a-23a, 24a-25a. The Immigration Judge also acknowledged that Mr. Kim had a bachelor's degree and is a native Korean speaker but found that Mr. Kim could have adjusted his status only if he had a degree in Korean languages, and that Mr. Kim would have had to have worked full time as a translator, although his recollection was that he worked part-time. App. 23a.

The Immigration Judge also found that it was "unusual" that Mr. Kim would travel to California to apply for his permanent residence because he lived in St. Louis, and that the fee Mr. Kim paid was "excessive." App. 23a.

On this basis, the Immigration Judge found, by "clear and convincing evidence," that "as a result of a legally and factually baseless immigration record" Mr. Kim was "improperly issued a Form I-551, resident alien card by the Immigration and Naturalization Service." App. 25a. The Immigration Judge concluded that Mr. Kim was inadmissible as "an alien present in the U.S. without being admitted or paroled," and as "an immigrant who is applying for admission without a valid travel document" under Sections 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act. App. 26a; 8 U.S.C. §§ 1182(a)(6)(A)(i), (a)(7)(A)(i)(I).

The Immigration Judge found that "an alien who acquired permanent resident status through fraud or misrepresentation has never been lawfully admitted for permanent residence and is therefore ineligible for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act." App. 26a.

The Immigration Judge did not sustain the government's charge that Mr. Kim "sought an immigration benefit by fraud or willful misrepresentation" under INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i). App. 27a. The Immigration Judge stated, "I do not believe [Mr. Kim] was perpetuated with fraud or willfully misrepresenting a material fact." App. 27a. "It's clear to the Court that what occurred [was] that he was a naïve person and was very young and did not understand the legalities in becoming a lawful permanent resident." *Id.* The court concluded, "I do not find that [he] bears any fault or that he committed any fraud." *Id.* Rather,

the Court believed that "it was some agents who acted for him who did this." *Id.*

2. The Board Of Immigration Appeals' Decision. Mr. Kim appealed the Immigration Judge's order. App. 14a-20a. The Board affirmed the Immigration Judge's holding that Mr. Kim was inadmissible as an immigrant who is applying for admission without a valid travel document under INA § 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I), but did not rule on the second ground of inadmissibility. App. 18a & n.5.

Mr. Kim argued that under Section 246(a) of the Immigration and Nationality Act, 8 U.S.C. § 1256(a), the government was not permitted to place him in removal proceedings based on a purported lack of eligibility for adjustment of status because the five-year statutory period for rescission of his permanent resident status had expired. App. 18a-19a. Mr. Kim relied on the Third Circuit's decision in *Bamidele* v. *INS*, 99 F.3d 557 (3d Cir. 1996), in which the court held that a permanent resident may not be deported after the five-year period where the sole grounds for deportation related to a fraud in connection with the adjustment of status. App. 19a & n.6.

The Board rejected Mr. Kim's argument, holding that while the government must initiate rescission proceedings within five years if it wishes to rescind the status, "there is no statute of limitations applicable to the initiation of removal proceedings." App. 19a. The Board rejected *Bamidele* on the ground that it was decided before a

1996 amendment to Section 1256(a) that added the following language to the statute: "Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status." App. 19a (quoting 8 U.S.C. § 1256(a)). The Board cited a contrary Fourth Circuit decision holding that Section 1256(a)'s limitations period applies to the government's power to rescind an adjustment of status, but not to a deportation action based on an erroneous grant of permanent resident status. App. 19a (citing *Asika* v. *Ashcroft*, 362 F.3d 264, 269-71 (4th Cir. 2004)).

The Board also rejected Mr. Kim's argument that he should have been treated as a returning resident, rather than as an arriving non-resident alien seeking admission. App. 17a-18a. The Board relied on a prior Board decision holding that "an alien is deemed, *ab initio*, never to have obtained lawful permanent resident status once his original ineligibility therefor is determined in proceedings." *In re Koloamatangi*, 23 I. & N. Dec. 548, 551 (B.I.A. 2003). The Board held that under *Koloamatangi*, Mr. Kim could be charged as an arriving alien applying for admission even though his ineligibility had not been determined in any prior proceeding. App. 18a.[4]

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[4] The Board also affirmed the Immigration Judge's evidentiary rulings and denial of cancellation of removal. App. 15a, 20a.

3. The Court Of Appeals' Decision. The Eighth Circuit affirmed the Board's decision. App. 1a-13a. The court acknowledged the Third Circuit's view "that this limitations period [of 8 U.S.C. § 1256(a)] applies to removal proceedings, not just rescission of status adjustments," but declined to adopt that view. App. 7a.

The court of appeals noted that in 1962 the Attorney General issued an opinion that Section 1256 "appl[ies] only to the rescission of status adjustments, not removal proceedings." App. 8a, citing *Matter of S--*, 9 I. & N. Dec. 548 (Att'y Gen. 1962). The court interpreted the 1996 revision to Section 1256 as supporting this interpretation because it "makes clear that the legislature viewed rescission and removal as separate, and applied the five-year limitations period to rescission only." App. 8a. The court held that to the extent there was any doubt, it would apply *Chevron* deference to the Attorney General's interpretation. App. 9a, citing *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

The court of appeals also rejected Mr. Kim's argument that he was improperly denied the presumption that he was a returning resident rather than an arriving non-resident alien. The court held that the Immigration Judge properly treated Mr. Kim as an arriving alien because he found that Mr. Kim's status was not legally conferred. App. 10a. For the same reason, the court held that Mr. Kim was not eligible for cancellation of removal. App. 11a-12a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split On Whether Section 1256(a)'s Limitations Period Applies To Removal Proceedings Based On Lack Of Eligibility To Have Obtained Lawful Permanent Resident Status.

The Eighth Circuit's opinion in this case recognizes the split among the circuits over whether the government may bring a deportation action against a lawful permanent resident based on his eligibility to have obtained that status after the five-year limitations period in 8 U.S.C. § 1256(a) has run. App. 7a (declining to adopt the Third Circuit's view); 8a (citing decisions of the Fourth and Ninth Circuits). Other courts and judges have also noted the split. *E.g.*, *Garcia* v. *Att'y Gen. of the United States*, 553 F.3d 724, 728 (3d Cir. 2009); *id.* at 731 (Fuentes, J., dissenting); *Asika*, 362 F.3d at 267. Respondent, in a brief filed in this Court, has also acknowledged the "conflict" between the Fourth Circuit and "a previous decision of the Third Circuit, *Bamidele* v. *INS*." *Asika* v. *Ashcroft*, No. 04-256, Brief of the United States in Opposition ("*Asika* Op.") at 7.

In *Bamidele* v. *INS*, the Third Circuit concluded that when the government seeks to deport an individual who has obtained lawful permanent resident status more than five years after the status was granted, on the "sole grounds of his misconduct in obtaining his adjustment of status," that action is barred by Section 1256(a)'s statute of limitations. 99 F.3d 557, 558 (3d Cir 1996). The court rejected

the government's view "that, although § 246(a) proscribes an untimely rescission of an alien's status adjustment, it has no effect on the INS's ability to deport that same immigrant on the *very same* grounds the INS claims render the original adjustment of status improper." *Id.* at 563. To accept this view, "in practical effect, would be construing [Section 1256(a)] out of existence." *Id.* at 564.

The Third Circuit held that the Attorney General's construction of Section 1256(a) was not entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, Inc., 467 U.S. 837 (1984). 99 F.3d at 561-62. The court held that Section 1256(a) is a statute of limitations, the construction of which "is not a matter within the particular expertise of the INS." *Id.* at 561. Rather, the court considered it "'a clearly legal issue that courts are better equipped to handle.'" *Id.* (quoting *Dion* v. *Sec'y of Health & Human Servs.*, 823 F.2d 669, 673 (1st Cir. 1987)). The court held that the construction of Section 1256(a) did not concern matters that would be "bolstered by [] reliance on the expertise of the INS." *Id.* at 562.

Earlier this year, the Third Circuit reaffirmed its decision in *Bamidele*. *Garcia* v. *Att'y Gen. of the United States*, 553 F.3d 724 (2009). In *Garcia*, the government argued that the 1996 amendment to Section 1256(a) undermined the holding in

Bamidele.[5] *Id.* at 727. The amendment added the following language to Section 1256(a):

> Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 U.S.C. § 1256(a). The Third Circuit held that the amendment did not undermine its decision in *Bamidele*. 553 F.3d at 728. The court reasoned that the amendment's two provisions were (1) to permit removal without a prior rescission, and (2) to make an order of removal sufficient to rescind the alien's status. *Id.* The court found it "significant" that the amendment does not modify the five-year limitations period. *Id.* The court found "no justification" for permitting a removal proceeding on the same grounds that are protected from rescission after five years. *Id.* The amended statute "still contemplates relief from deportation." *Id.*

In conflict with the Third Circuit, three courts of appeals now hold the contrary view that an alien

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[5] In its brief before the court of appeals, the government argued that because of this amendment it was unclear whether the Third Circuit would continue to adhere to *Bamidele*. Resp. C.A. Br. at 28. The government made the same argument in its brief to this Court opposing the petition for certiorari in *Asika*. *Asika* Op. at 13.

may have his permanent resident status rescinded through removal proceedings on the ground that his adjustment of status was improper, even after the Attorney General may no longer directly rescind his status.

The Eighth Circuit's decision in this case directly rejected *Bamidele* and *Garcia*. App. 7a & n.4 (declining "to adopt the Third Circuit's view that this limitations period applies to removal proceedings, not just rescission of status adjustments."). The Fourth Circuit has likewise rejected the claim that Section 1256(a) bars a removal proceeding based on the alien's lack of eligibility for his adjustment of status. *Asika* v. *Ashcroft*, 362 F.3d 264, 270-71 (4th Cir. 2004). The Ninth Circuit has also held "that section 1256 does not apply to bar deportation proceedings against an adjusted alien." *Monet* v. *INS*, 791 F.2d 752, 754 (9th Cir. 1986); *see also Biggs* v. *INS*, 55 F.3d 1398, 1401 (9th Cir. 1995); *Oloteo* v. *INS*, 643 F.2d 679, 682-83 (9th Cir. 1981).

The Fourth and Eighth Circuits' decisions conflict with the Third Circuit's decisions in *Garcia* and *Bamidele* in a second respect. The Third Circuit held that the government's view of Section 1256(a) was not entitled to *Chevron* deference because "[a] statute of limitations is not a matter within the particular expertise of the INS," and is instead "a clearly legal issue that the courts are better equipped to handle." *Bamidele*, 99 F.3d at 561. In contrast, both the Eighth and Fourth Circuits concluded that *Chevron* deference should be afforded to the Attorney General's interpretation of Section 1256(a). *Compare Garcia*, 553 F.3d at 727 *with* App. 8a-9a, *Asika*, 362

F.3d at 267 ("[W]e must defer, under *Chevron*, to the INS's longstanding interpretation of its removal power as being unrestricted by such a statute of limitations.").[6]

The circuit split in this case merits the Court's review. In its opposition to the petition for certiorari in *Asika*, the government acknowledged that the decision conflicted with *Bamidele*, but asserted two reasons why certiorari should nevertheless be denied. *Asika* Op. at 13-14. The government asserted that the issue "has not recurred with frequency" and that "[i]t is unclear whether the Third Circuit would reach the same result" as it did in *Bamidele* after the amendment to Section 1256(a). *Id.* at 13.

The government's latter objection to review by this Court has now been removed. In *Garcia*, the Third Circuit reaffirmed its decision in *Bamidele*. The Third Circuit also denied the government's petition for rehearing en banc in *Garcia*, with only two votes in favor. *See* Order Denying Rehearing En Banc, *Garcia* v. *Attorney General*, (3d Cir. Feb. 4,

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[6] The split in authority over the applicability of *Chevron* deference provides an additional reason to grant certiorari here. In accord with the Third Circuit, the Second Circuit has held, in a case considering another limitations period under the Immigration and Nationality Act, that interpretation of the limitations period is "a question purely of statutory construction," which "avoid[s] the danger of venturing into areas of special agency expertise, concerning which courts owe special deference under the *Chevron* doctrine." *Iavorski* v. *INS*, 232 F.3d 124, 133 (2d Cir. 2000).

2009). The Third Circuit is thus unlikely to revisit its opinion again. Without this Court's intervention, the split in authority is likely to persist.

Contrary to the government's position in *Asika*, the issue is also recurring. The issue has so far been decided in published opinions of two courts of appeals this year, and also arose in an unpublished decision in the Ninth Circuit. *Cardenas-Mendoza* v. *Holder*, 2009 U.S. App. LEXIS 5919 (9th Cir. Mar. 20, 2009). In addition to the published cases forming the split, the issue has arisen directly or was implicated by the facts of numerous other cases in the courts of appeals in recent years.[7]

The issue is also important. For longtime permanent residents like Mr. Kim, deportation is a severe crisis. It entails removing an individual from the community in which he or she has built a family over many years and placing the individual in a country with which he or she may have few or no

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[7] *E.g.*, *Lopez-Avalos* v. *Mukasey*, 273 Fed. Appx. 684 (9th Cir. 2008) (unpublished); *Omar* v. *INS*, 266 Fed. Appx. 37, 38 (2d Cir. 2008) (unpublished); *De Guzman* v. *Att'y Gen. of the United States*, 263 Fed. Appx. 222, 226 (3d Cir. 2008) (unpublished); *Tinoco-Garcia* v. *Gonzales*, 227 Fed. Appx. 615, 616 (9th Cir. 2007) (unpublished); *Savoury* v. *United States Att'y Gen.*, 449 F.3d 1307, 1310 (11th Cir. 2006); *Arellano-Garcia* v. *Gonzales*, 429 F.3d 1183, 1187 (8th Cir. 2005); *Valente-Narcizo* v. *Gonzales*, 139 Fed. Appx. 878, 880 (9th Cir. 2005) (unpublished); *Sanchez* v. *Winfrey*, 134 Fed. Appx. 720, 722 (5th Cir. 2005) (unpublished); *Kim* v. *Ashcroft*, 95 Fed. Appx. 418, 422 (3d Cir. 2004) (unpublished).

remaining ties. "Aliens who obtain adjusted status have a legitimate expectation that their immigration will be permanent." *Choe* v. *INS*, 11 F.3d 925, 930 (9th Cir. 1993). While permanent residents may face removal for violating the law, "adjusted aliens are still entitled to some minimal sense of security in their permanent resident status." *Id.* Permanent residents like Mr. Kim create networks of family, friendship, and work relationships in this country. By enacting Section 1256's bar to rescission of permanent resident status, Congress recognized that after five years, permanent residents are entitled to rely on their status without fear that they will be deported. Because Section 1256(a) provides permanent residents with "immigration peace," they can enthusiastically pursue greater and deeper ties to this country and their community, ultimately contributing more to society than an individual who views himself as only a transitory resident who may be asked to leave at any time.

This case is a good vehicle to decide the question presented and demonstrates the troubling way in which the government's interpretation has led it to implement Section 1256(a). There is no dispute that Mr. Kim's permanent resident status was granted more than five years before removal proceedings were brought against him or that he was found removable based on ineligibility for that status at the time it was granted. Despite acknowledging that it could not rescind that status after five years, the government was permitted to proceed as if Mr. Kim had never received that status at all. When Mr. Kim attempted to use a valid, government-issued permanent resident card to enter the country as he

had done for ten years, he was treated as if he had arrived in the country for the first time with no documentation whatsoever. Indeed, the charge sustained by the Board was that Mr. Kim was an alien who arrived without any valid entry document.

II. Section 1256(a)'s Limitations Period Applies To Removal Proceedings Based On Lack Of Eligibility To Have Obtained Lawful Permanent Resident Status.

The lower court decisions holding that the Attorney General may accomplish the rescission of an alien's lawful permanent resident status beyond the five-year limitations period of Section 1256(a)—simply by initiating removal proceedings on the ground that the individual was not eligible to receive that status—are not persuasive. The effect of those decisions is to construe Section 1256(a) out of existence.

Section 1256(a) creates a statutory bar to rescinding a lawful permanent resident's status based on initial ineligibility once five years have elapsed after that status was granted. 8 U.S.C. § 1256(a). The limitation in Section 1256(a) is a narrow one: It applies "'only where a deportation is based on an attack on the adjustment itself.'" *Garcia*, 553 F.3d at 728 (quoting *Bamidele*, 99 F.3d at 564). The decisions of the Fourth, Eighth, and Ninth Circuits, however, permit the Attorney General to avoid the statutory bar simply by instituting removal proceedings charging that the permanent resident status should never have been granted in the first place. If the limitation in Section

1256(a) is to be effective, it must also apply to rescission accomplished through removal proceedings attacking the initial adjustment of status.

Two of the circuits on the other side of the circuit split have acknowledged the force of this argument. The Ninth Circuit found "appealing" the argument that when the government seeks to deport an individual "on the ground of a fraudulent immigration status obtained" outside the statutory period "that action amount[s] to a rescission of the adjustment of [the] immigrant status." *Biggs* v. *INS*, 55 F.3d 1398, 1401 n.3 (9th Cir. 1995). The Fourth Circuit likewise agreed that there is "some force" to the argument that reading Section 1256(a) not to apply to deportation proceedings permits the government "to rescind an alien's status through the deportation process, notwithstanding the passage of the five-year statute of limitations on rescission actions," and that construction "would 'construe [section 1256(a)] out of existence.'" *Asika*, 362 F.3d at 270 (quoting *Bamidele*, 99 F.3d at 564).

The government has also acknowledged the troublesome import of its position. In 1962, the Board of Immigration Appeals referred the issue of Section 1256(a)'s application to deportation and exclusion proceedings for a decision of the Attorney General. *Matter of S--*, 9 I. & N. Dec. 548 (Att'y Gen. 1962). The Board of Immigration Appeals had held that Section 1256(a)'s limitations period barred exclusion proceedings based on an improper adjustment of status, holding that there is "no logical reason" why Congress would "protect this status by a

statute of limitations, even though the status had been acquired by one who was not eligible" yet "withdraw that protection because the alien had left the country and reapplied for admission on the basis of the very adjustment of status which they had protected." *Id.* at 550.[8]

The Attorney General disagreed with the Board, but noted that under his interpretation Section 1256(a) "may be of little practical value to the alien." *Id.* at 555. The Attorney General's narrow interpretation was that the statute of limitations "prevents the Attorney General from returning the alien to the category of a nonimmigrant" after the five-year period, but acknowledged that this "entails no real benefit to the alien since the same conduct nevertheless can be utilized independently as a ground for his deportation or exclusion." *Id.* The Attorney General admitted that his interpretation "makes it difficult to ascertain precisely why Congress enacted the time limitation." *Id.*

In this case, the court of appeals relied on the fact that Section 1256(a) "only discusses the five year statute of limitations in terms of rescinding a status

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[8] As here, *Matter of S--* involved a permanent resident who sought to reenter the country. At the time, INS agreed that the statute of limitations applied to deportation proceedings, though not to exclusion proceedings. 9 I. & N. Dec. at 549 ("The Service apparently agrees that where there has been no rescission of the adjustment of status there can be no expulsion of an alien (who did not depart after the adjustment) on grounds which made the alien ineligible for the adjustment.").

adjustment." App. 8a. But Section 1256(a) also discusses removal proceedings as a means of rescinding an alien's status, stating that "an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status." 8 U.S.C. § 1256(a). The text of the statute thus shows that the limitations period applies to both rescission actions and removal proceedings when they are based on initial ineligibility for adjustment of status.

The government's reliance on the 1996 amendment to Section 1256(a) is also misplaced. The language of the amendment permits the government to bring a removal action without first having rescinded the permanent resident's status, and states that a final order of removal is sufficient to rescind an alien's permanent resident status. 8 U.S.C. § 1256(a). According to the court of appeals, "This amendment makes clear that the legislature viewed rescission and removal as separate, and applied the five-year limitations period to rescission only." App. 8a; *see also Garcia*, 553 F.3d at 730 (Fuentes, J., dissenting).

This puts more weight on the 1996 amendment than it can bear. The language of the amendment does not say that rescission and removal proceedings are "separate." To the contrary, the amendment allows for rescission and removal to be combined in a single proceeding. If an alien whose permanent resident status is subject to rescission is also removable, the government need not complete the rescission before initiating removal proceedings. Instead, the government may proceed directly to removal proceedings, and a final removal order will

have the effect of rescinding the alien's permanent resident status. The amendment thus serves to eliminate any argument that a permanent resident alien is not subject to removal because his or her adjustment was not first rescinded. If the removal action is successful, the final order rescinds the alien's status just as a rescission order would have done. Accordingly, the limitations period applicable to rescission actions is likewise applicable to rescissions accomplished in deportation proceedings.

Chevron deference is not warranted here because the statute is clear. Moreover, the Second and Third Circuits are correct that interpretation of a statute of limitations is the type of matter well within the courts' expertise to decide without any expert assistance from the agency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2009

APPENDIX

No. 08-2211

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Sungwook Kim, Petitioner,

v.

Eric H. Holder, Jr.,[1]
United States Attorney General, Respondent.

December 11, 2008, Submitted
March 26, 2009, Filed

Before LOKEN, Chief Judge, BEAM, Circuit Judge, and KYLE, District Judge.[2]

BEAM, Circuit Judge.

Sungwook Kim petitions for review of the Board of Immigration Appeals' (BIA) decision to affirm an Immigration Judge's (IJ) order that Kim be removed from the United States pursuant to sections 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (INA), 8 U.S.C.

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder, Jr., is automatically substituted for Michael B. Mukasey as respondent.

[2] The Honorable Richard H. Kyle , United States District Judge for the District of Minnesota, sitting by designation.

§§ 1182(a)(6)(A)(i), (a)(7)(A)(i)(I), and denying his request to cancel the removal proceedings under section 240A(a) of the INA, 8 U.S.C. § 1229b(a). For the following reasons, we deny Kim's petition.

I. BACKGROUND

Kim, a native citizen of South Korea, entered the United States on an F-1 student visa in 1988. After college, Kim's employer helped him begin the process of obtaining permanent residency. In 1992, Kim went to San Jose at his employer's direction to fill out the necessary paperwork for his Permanent Resident Card (green card). Kim was told that the cost to obtain his card would be $ 10,000, of which he paid $ 2,000 while in San Jose--the remaining balance was withheld from his paychecks. Later that same year, Kim received his green card.

For the next ten years, Kim lived and worked in St. Louis, Missouri, and once a year traveled to South Korea to visit family. While attempting to reenter the United States following his most recent visit to South Korea in 2003, Kim was detained by Immigration and Naturalization Service (INS)[3] officers in Chicago for having an invalid green card. Kim was released, but was later served with a Notice to Appear that, as amended, alleged he was subject to removal under INA sections 212(a)(6)(A)(i), 212(a)(6)(C)(i), and 212(a)(7)(A)(i)(I).

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[3] In March 2003, the INS became a part of the Department [*3] of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

The controversy surrounding Kim's green card stems from the conviction of Leland Sustaire, the Supervisory District Adjudication Officer for the INS's San Jose office during the time Kim applied for and received his green card. In 1998, Sustaire admitted to accepting bribes in exchange for issuing green cards. The government alleged Kim's green card was fraudulently issued based on a "legally and factually baseless immigration record" that was created at the behest of Kim, or his agent, after the payment of a bribe to Sustaire. As a result, the government sought Kim's removal as an arriving alien without the proper documentation.

At Kim's hearing before the IJ, the government submitted several exhibits over Kim's objection to show Kim's green card was fraudulently issued. The government introduced: a form I-213 Record of Deportable/Inadmissible Alien; a list of alien numbers, prepared by Sustaire, representing those persons from whom Sustaire received bribes; and, from the bribery trials, the government's Motion for Downward Departure, a transcript of Sustaire's testimony, and a copy of the judgments. Further, Agent Lesley Brown testified regarding the bribery scheme, specifically noting that Kim was ineligible for a status adjustment at the time it was issued to him in 1992. Kim challenged the introduction of this evidence as irrelevant, without foundation, and as inadmissible hearsay.

The IJ found the evidence showed it was "unusual" that Kim would travel from St. Louis to San Jose to obtain his green card. Further, the IJ found Kim did not qualify for a green card at the time it was obtained. The IJ also found the amount

Kim paid to obtain the green card and the quickness with which it was received were suspect. Finally, the list, sorted by alien number, prepared by Sustaire in his bribery trial showing the green cards issued for which he received a bribe, included Kim's alien number and corroborated the government's allegation. Thus, the IJ found by "clear and convincing evidence that . . . a legally and factually baseless immigration record . . . [was] improperly issued," and, as a result, Kim did not possess a valid green card, and was therefore removable.

The BIA, on Kim's appeal, agreed with the IJ. Kim's claim that the IJ erred in admitting the government's evidence was rejected by the BIA because hearsay is admissible when probative and fundamentally fair, and the government's evidence was both. Additionally, the BIA found Kim was properly charged on inadmissibility grounds because he was not "an alien lawfully admitted for permanent residence at the time he attempted to return." The BIA also noted that 8 U.S.C. § 1256(a) did not prohibit the removal proceedings as time-barred because the five-year statute of limitations relied upon by Kim applied only to rescission of status adjustments, not removal. Kim was also found not eligible for cancellation of the removal proceedings by the BIA because cancellation only applies to lawful permanent residents, which Kim was not. Kim petitions this court for review alleging he was denied due process by the admission of the government's evidence, he was improperly treated as an arriving alien, and he qualified for cancellation of the removal proceedings.

II. DISCUSSION

"We review questions of law de novo and accord substantial deference to the BIA's interpretation of immigration law and agency regulations." *Arellano-Garcia* v. *Gonzales*, 429 F.3d 1183, 1185 (8th Cir. 2005).

A. Hearsay Evidence

Instead of challenging the sufficiency of the government's evidence establishing that Kim's green card was illegally issued, Kim alleges the evidence was inadmissible hearsay. The federal rules of evidence, however, do not apply in immigration proceedings. *Solis* v. *Mukasey*, 515 F.3d 832, 835-36 (8th Cir. 2008). Hearsay evidence is therefore admissible if it "'is probative and its admission is fundamentally fair.'" *Id.* at 836 (quoting *Nyama* v. *Ashcroft*, 357 F.3d 812, 816 (8th Cir. 2004)). The government's evidence is undoubtedly probative as it addresses the assertion that Kim was not eligible to receive his green card and received it from Sustaire only through bribery. While only one document directly links Kim to Sustaire, the remaining documents put the bribery scheme in context. Further, Agent Brown was active with the Sustaire investigation, which involved about 340 immigration cases. Thus, Agent Brown's testimony on the matter is certainly probative.

In addition to being probative, evidence must be fundamentally fair to be admissible. The evidence in this case was either part of the public record of a trial, given under oath, or presumptively reliable as produced by public officials during the ordinary course of their duties. Instead of stating why this

evidence is untrustworthy, Kim attempts to show a due process violation by arguing that hearsay evidence in general is inherently unreliable and that he must be able to cross-examine witnesses. However, this is not enough to show that admitting the evidence is fundamentally unfair because hearsay evidence is not per se inadmissible in immigration cases as violative of due process. Id. In each case Kim cites to the contrary, the hearsay evidence was inadmissible based on specific facts, not because hearsay is generally unreliable. *Anim* v. *Mukasey*, 535 F.3d 243, 257 (4th Cir. 2008) (declarants were foreign officials who had "powerful incentives to be less than candid"); *Ezeagwuna* v. *Ashcroft*, 325 F.3d 396, 406 (3d Cir. 2003) (multiple levels of hearsay and the first and second declarants were unknown); *Murphy* v. *INS*, 54 F.3d 605, 610-11 (9th Cir. 1995) (holding the I-213 form inadmissible as unreliable because alien disputed content and provided specific evidence to the contrary). In this case, Kim has provided no basis upon which to doubt the accuracy of the evidence in question beyond generalizations regarding the unreliability of hearsay evidence. Thus, the IJ did not err in admitting the evidence.

B. Kim's Status as an Arriving Alien and 8 U.S.C. § 1256(a)

We next address Kim's assertion that 8 U.S.C. § 1256(a) barred these removal proceedings. Kim states that if "the government believes that permanent residence status was improperly conferred, the immigration laws include a statutory procedure to rescind adjustment of status, under 8 U.S.C. § 1256(a)." Further, Kim argues that because

that section includes a five-year statute of limitations, the government's action is time-barred. Kim asks us to adopt the Third Circuit's view[4] that this limitations period applies to removal proceedings, not just rescission of status adjustments, because otherwise "anyone the government believed was adjusted improperly would instantly be deprived of their status and subject to immediate removal." We decline to do so.

Section 1256(a) states:

> If, at any time within five years after the status of a person has been otherwise adjusted . . . to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of

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[4] *Garcia* v. *Attorney General*, 553 F.3d 724 (3d Cir. 2009); *Bamidele* v. *INS*, 99 F.3d 557 (3d Cir. 1996).

> this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 U.S.C. § 1256(a).

On its face, § 1256(a) only discusses the five-year statute of limitations in terms of rescinding a status adjustment, and since 1962 the Attorney General has interpreted that section to only apply to the rescission of status adjustments, not removal proceedings. *Asika* v. *Ashcroft*, 362 F.3d 264, 269 (4th Cir. 2004) (per curiam) (citing *Matter of S--*, 9 I. & N. Dec. 548, 548 (Att'y Gen. 1962)). Supporting the Attorney General's interpretation, § 1256(a) was amended in 1996 to add the following sentence, "[n]othing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien . . . and an order of removal issued by an [IJ] shall be sufficient to rescind the alien's status." 8 U.S.C. § 1256(a). This amendment makes clear that the legislature viewed rescission and removal as separate, and applied the five-year limitations period to rescission only. *See also Garcia*, 553 F.3d at 729-31 (Fuentes, J., dissenting) (noting the 1996 amendment "confirms that the five-year bar is meant to apply only to rescission proceedings" and "indicates that Congress does not view rescission and removal as equivalents"); *Oloteo* v. *INS*, 643 F.2d 679, 682-83 (9th Cir. 1981) (holding Congress "plainly, unequivocally and unambiguously" meant to apply the five-year limitations period to rescission only).

To the extent there is any doubt as to the plain meaning of the statute, we defer to the Attorney

General's interpretation of the statute where such an interpretation is not unreasonable. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *see also Asika*, 362 F.3d at 269. As stated above, § 1256(a) does not limit removal to the five-year limitations period on its face, and the section "govern[ing] deportation refer[s] neither to [§ 1256(a)] nor the statute of limitations that it purportedly creates, nor, for that matter, to any time limitation on deportation at all." *Asika*, 362 F.3d at 269. Thus, it is not unreasonable for the Attorney General to interpret § 1256(a)'s five-year statute of limitations to apply to rescission only.

Having concluded that the government's action is not time-barred by § 1256(a), we turn to Kim's assertion that "he was found removable as an inadmissible arriving alien, without requiring the government to prove by clear, unequivocal, and convincing evidence that he was not a Permanent Resident." Relying on 8 U.S.C. § 1101(a)(13)(C) and 8 C.F.R. § 235.3(b)(5), Kim alleges he was denied the presumption that he was a returning United States resident, treated as an arriving alien, and therefore "stripped [] of the procedural protections afforded to U.S. residents." We disagree.

Section 1101(a)(13)(C) applies only to "[a]n alien lawfully admitted for permanent residence," and 8 C.F.R. § 235.3(b)(5) applies only to claims of "lawful permanent resident . . . status." 8 U.S.C. § 1101(a)(13)(C) (emphasis added); 8 C.F.R. § 235.3(b)(5) (emphasis added). Thus, Kim is only entitled to the presumption of being a returning United States resident and not an arriving alien if he

was a lawful permanent resident. In addressing this issue, the IJ held by "clear and convincing evidence" that Kim "[was] not a lawful permanent resident of the United States." The IJ did so only after considering the government's evidence and stating "that the evidence is clear and convincing" that a "legally and factually baseless immigration record was fraudulently created for the purpose of improperly issuing [] a [green card]." Kim admits in his brief that "[h]e would [] be subject to removal only if the government could prove to the required standard that his status was not lawfully conferred." The IJ, however, did in fact find that the government proved to the required standard[5] that Kim's status was not lawfully conferred, and therefore did not err in treating Kim as an arriving alien.

Having correctly designated Kim an arriving alien, and not a returning resident, the IJ held Kim removable under 8 U.S.C. §§ 1182(a)(6)(A)(i) and 1182(a)(7)(A)(i)(I). These sections address "aliens who are inadmissible . . . and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a). Section 1182(a)(6)(A)(i) declares an alien who is in the United States "without being admitted . . . is inadmissible." Further, § 1182(a)(7)(A)(i)(I) states an

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[5] In his brief and at oral argument Kim posits, citing *Berenyi* v. *INS*, that the required standard is "clear, unequivocal, and convincing evidence." 385 U.S. 630, 636-37, 87 S. Ct. 666, 17 L. Ed. 2d 656 (1967) (emphasis added). This standard, however, applies only to the deportation of persons whose "citizenship [is] already acquired." *Id.* at 636. The "unequivocal" standard has not been used and does not apply when addressing the preliminary question of whether citizenship has been lawfully acquired in the first place.

alien is inadmissible if he does not possess the proper documentation. In this case, Kim did not possess the proper documentation because his green card was not lawfully conferred and he was not lawfully admitted to be in the United States. Thus, the IJ did not err in holding Kim removable under 8 U.S.C. §§ 1182(a)(6)(A)(i) and 1182(a)(7)(A)(i)(I).

C. Cancellation of Removal Proceedings

Finally, Kim claims to have established eligibility for cancellation of the removal proceedings under 8 U.S.C. § 1229b(a). Pursuant to § 1229b(a), the removal of an alien may be canceled if three conditions are met. First, the alien must have been "lawfully admitted for permanent residence for not less than 5 years." 8 U.S.C. § 1229b(a)(1). Second, the alien must have lived in the United States continuously for seven years after being admitted in any status. Id. § 1229b(a)(2). Finally, the alien must not have been convicted of an aggravated felony. *Id.* § 1229b(a)(3). The IJ determined that Kim did not qualify for cancellation because he was not lawfully admitted for permanent residence as his green card was fraudulently obtained. On appeal, however, Kim asserts the government failed to prove "that Kim lacked the qualifications for Permanent Resident status at the time he was approved."

Kim's assertion that the government failed to prove he would not qualify for Permanent Resident status confuses the issues. Section 1229b(a) asks whether the alien "has been . . . lawfully admitted for permanent residence," not whether the alien could have been lawfully admitted. *Id.* § 1229b(a)(1) (emphasis added). The IJ found, based on the government's evidence, that Kim's green card was

obtained by fraud and that he, therefore, had not been lawfully admitted for the requisite five years and did not qualify for § 1229b(a) relief. *See Arellano*, 429 F.3d at 1187; *In re Koloamatangi*, 23 I & N Dec. 548, 550 (BIA 2003). Thus, Kim was not eligible for cancellation because he was not lawfully admitted for permanent residence.

Kim's attempt to differentiate *Arellano* and *Koloamatangi* on the grounds that the government has not shown he "lacked the qualifications" for the green card fails. Neither *Arellano* nor *Koloamatangi* required a showing that the alien both procured his green card via fraud and did not otherwise qualify for the green card. Rather, when an alien obtains a green card via fraud, that alien is not lawfully admitted for permanent residence and is not entitled to relief under § 1229b(a), even if the alien would have otherwise qualified for the green card notwithstanding the fraud.

Nevertheless, the BIA specifically addressed this issue and found that Kim did not qualify for a green card when it was issued to him. As the BIA correctly noted, an alien seeking a status adjustment in 1992 was required, among other things, to present a labor certification and have a medical examination performed. 8 U.S.C. § 1182(a)(5) (1992); 8 C.F.R. §§ 212.8, 245.5 (1992). Kim, by his own admission, did not possess a labor certificate and did not have a medical examination performed. Thus, even though the government was not required to show Kim did not qualify for a green card notwithstanding the fraud, it is evident from the record that Kim did not, in fact, qualify.

III. CONCLUSION

For the foregoing reasons, we deny Kim's petition for review.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A72 095 200 - St. Louis, MO

Date: May 13 2008

In re: SUNG WOOK KIM

REMOVAL PROCEEDINGS

APPEAL

CHARGES:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] Immigrant - no valid immigrant visa or entry document

Lodged: Sec. 212(a)(6)(C)(I), I&N Act [18 U.S.C. § 1182(a)(6)(C)(I)] - Fraud or willful misrepresentation of material fact

APPLICATION: Termination; cancellation of removal

The respondent, a native and citizen of the Republic of Korea, appeals the Immigration Judge's May 16, 2006, decision finding him removable under sections 212(a)(6)(A)(I) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(6)(A)(I), (a)(7)(A)(i)(I), and denying his application for cancellation of removal under section

240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Department of Homeland Security (the "DHS") has filed a brief in opposition to the appeal.[1] The appeal will be dismissed.

We reject the respondent's initial assertion that the Immigration Judge erred in admitting hearsay documents and testimony that demonstrated that the respondent was granted lawful immigrant status despite his ineligibility for adjustment of status. Hearsay evidence is admissible in removal proceedings so long as such evidence is probative and its use is not so fundamentally unfair as to offend due process standards. *See Nyama* v. *Ashcroft*, 357 F.3d 812, 816 (8th Cir. 2004). Viewed cumulatively, the hearsay contained in the documentary evidence presented by the DHS and in the testimony of Special Agent Lesley Brown of the DHS is highly probative that the respondent was granted third preference employment-based lawful permanent residence, notwithstanding his actual ineligibility for such status, through the illegal actions of Leland Sustaire, a former DHS employee who was engaged in a criminal conspiracy to grant lawful status to aliens not otherwise eligible to adjust their status (Exh. 4, Exhs. F, L, M, N; Transcript of March 14, 2006, Hearing at 34-60).[2] Further, we cannot say

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[1] Although the DHS argues in part in its appellate brief that the Immigration Judge erred in failing to sustain its additional charge that the respondent is inadmissible under section 212(a)(6)(C)(i) of the Act, it did not formally appeal that determination. As such, the issue is nut properly before us.

[2] We find no merit to the respondent's generalized assertion that the DHS may not use affidavits from absent witnesses without having made reasonable efforts to secure those (...continued)

that the Immigration Judge's admission of such evidence was fundamentally unfair. In that regard, the respondent has not effectively challenged the accuracy of the statements in his Form I-213, which is a presumptively trustworthy document (Exh. 4, Exh. F). *See Matter of Ponce Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999). The Immigration Judge's consideration of the testimony of Sustaire during a trial of one of his co-conspirators and of a list provided by Sustaire of the A numbers of aliens to whom he illegally provided green cards (which included the respondent's alien number) was also proper (Exh. 4, Exhs. M, N). *See* 8 C.F.R. § 1240.7(a) (permitting the Immigration Judge during removal proceedings to receive into evidence oral and written statements previously made during an investigation or trial as long as they are material and relevant to the case).[3] And we cannot conclude that the admission of that evidence was fundamentally unfair where the independent testimony of Agent Young, corroborated in part by the respondent, also reflected that the respondent could not have obtained

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witnesses at his hearing. Initially, we note that the respondent did not voice any objection to the DHS's efforts to secure absent witnesses when the documentary evidence at issue was admitted, (Transcript of March 14, 2006, hearing at 27-31), and he has not developed this argument with any specificity in his brief on appeal (Appeal Brief at 14). Even so, the DHS did not introduce any affidavits into evidence in this case.

[3] We find no clear error in the Immigration judge's finding that the respondent's A number was in fact on the list provided by Sustaire to agents of the office of the Inspector General during the Justice Department's investigation of his criminal scheme (I.J. at 5; Exh. 4, Exh. M). *See* 8 C.F.R. § 1003.1(d)(3); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 365 (1948).

adjustment of status lawfully (Transcript of March 14, 2006, hearing at 45-46, 64-71; Exh. 4, Tabs D, E). *See generally* section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3) (setting out requirements for obtaining third-preference employment-based immigration visas); 8 C.F.R. §§ 204.5(l)(3) (requiring labor certifications for the respondent's employment-based immigration preference, which the respondent lacked), 1245.5 (requiring a medical examination for adjustment of status applicants, which the respondent did not take). Finally, the respondent was able to cross-examine Agent Young concerning how she learned about his case and the requirements for obtaining adjustment of status, as well as the basis for her conclusion that he had not adjusted his status lawfully (Transcript of March 14, 2006, hearing at 48-60). Under these circumstances, we cannot conclude that the admission of hearsay evidence deprived the respondent of a fair hearing.

We also find no merit in the respondent's contention that the DHS improperly charged him with inadmissibility grounds, rather than deportability grounds. Specifically, as we have already noted, the evidence of record reflects that the respondent was not in fact even an alien *lawfully* admitted for permanent residence at the time he attempted to return to this country in 2003, since he was not actually entitled to lawful permanent resident status when he acquired it. *C.f. Matter of Koloamatangi*, 23 I&N Dec. 548, 550 (BIA 2003) (holding that an alien is deemed, *ab initio*, never to have obtained lawful permanent resident status once

his original ineligibility for such status is determined in removal proceedings).[4] When the circumstances of the respondent's acquisition of lawful permanent residence were discovered upon deferred inspection, he was properly considered an applicant for admission subject to grounds of inadmissibility, rather than as a returning lawful permanent resident who would only be considered an applicant for admission if he fell within any of the criteria of 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C). An in light of the fact that the respondent could not show that he had a valid visa or other valid entry document at the time of his deferred inspection, he was not able to meet his burden of proving that he was not inadmissible under section 212(a)(7)(A)(i)(I) of the Act. *See* section 240(c)(2) of the Act, 8 U.S.C. § 1229a(c)(2).[5]

We further reject the respondent's contention that, pursuant to section 246(a) of the Act, 8 U.S.C. § 1256(a), the DHS cannot place him in removal proceedings because it did not rescind his lawful

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[4] We construe *Matter of Koloamatangi*, *supra*, to address both those aliens who obtain lawful permanent resident status by fraud and those who obtain such status under other circumstances in which they are not entitled to it. *See* 23 I&N Dec. at 550 (approving reasoning in circuit case law that the term "lawfully admitted for permanent residence" does not apply to aliens who obtained their permanent resident status by fraud, *or had otherwise not been entitled to it*) (emphasis added).

[5] Inasmuch as the respondent is inadmissible under section 212(a)97)(A)(i)(I) of the Act, we need not consider the Immigration Judge's alternate finding that his also inadmissible under section 202(a)(6)(A)(i) of the Act.

permanent resident status and it cannot now rescind his status because the 5-year statute of limitations has expired. We note that section 246(a) of the Act was amended by section 378(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA), to provide that "[n]othing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the aliens' status." We interpret amended section 246(a) as a whole to mean that *if* the DHS wishes to rescind lawful permanent residence status at the district counsel level, it must initiate rescission proceedings within 5 years. However, there is no statute of limitations applicable to the initiation of removal proceedings in Immigration Court despite an improper grant of adjustment of status by the DHS. *See generally* section 239 of the Act, 8 U.S.C. § 1229; *cf. Asika* v. *Ashcroft* 362 F.3d 264, 269-71 (4th Cir. 2004) (deferring to the Board's construction of section 246(a) of the Act as limiting only the agency's power to rescind an alien's adjustment of status and not its ability to deport an alien on the ground that his adjustment of status was erroneously granted).[6] We

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[6] The respondent's reliance on *Bamidele* v. *INS*, 99 F.3d 557 (3d Cir. 1996), is misplaced. That case was decided before the amendment of section 246(a) of the Act by IIRIRA. Moreover, in *Bamidele*, *supra*, the United States Court of Appeals for the Third Circuit expressly stated that it had no opinion as to whether "subsequent amendments to the Act would make someone in Bamidele's position [who, like the respondent, was (...continued)

therefore conclude that the respondent was properly placed in these proceedings.

For the foregoing reasons, we find no error in the Immigration Judge's decisions not to terminate the respondent's proceedings and to deem him inadmissible. Finally, we decline to remand this case for consideration of the respondent's application for cancellation of removal for lawful permanent residents. Because the respondent's adjustment of status was not lawful, he his not a lawful permanent resident for purposes of seeking cancellation of removal. *Cf. Arellano-Garcia* v. *INS*, 429 F.3d 1183 (8th Cir. 2005) (holding that an alien who received adjustment of permanent residency status as a result of a mistake in overlooking his drug trafficking conviction was not "lawfully admitted for permanent residence" for purposes of eligibility for a waiver of inadmissibility under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994), a predecessor to cancellation of removal for lawful permanent residents).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

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placed in proceedings more than 5 years after obtaining adjustment of status and whose status had never been rescinded] deportable." *Id.* at 557.

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW

UNITED STATES IMMIGRATION COURT

Oakdale, Louisiana

File A 72 095 200

In the Matter of

Sung Wook Kim,

Respondent

May 16, 2006

In Removal Proceedings

DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent whose name is Sung Wook Kim is a male native and citizen of South Korea who the Court finds is an arriving alien before this Court and was paroled in at the time of entry, coming back into the United States on or about March the 4th, 2003 after arriving at or near Chicago, Illinois on March 20, 2003. He admits that he is a native and citizen of Korea; admits allegations 3 and 4; 5, 6, 7, 8, 10, and 11 were, therefore, denied by the respondent. And the Court has taken evidence from Officer Lesley Brown and also the respondent concerning whether the respondent is removable as charged.

The evidence consistence of Exhibits 1 through 6; the testimony of Lesley and that of the respondent. Ms. Brown was sworn in by the Court, and she testified that she was an employee of the Department of Homeland Security, worked about 15 years in San Francisco, and she's also worked Inspections. She testified that what the NAILS system was, and this was the previous system used to look out for people who were not admissible to the United States.

She testified that Leland Sustair was an employee of the INS. He was an adjudicator at the San Jose, California office and that he was convicted of conspiracy to bribe a public official and that he was in an administrative position with the INS during that time of the respondent around 1992 when he obtained a lawful permanent resident card. Mr. Sustair was convicted and also gave a list of all the cards that was issued illegally by him. The Court notes that all those files were destroyed, he burned them. he gave out these cards illegally for money or bribery. Almost all of the individuals, Ms. Brown testified, were Korean nationals. The LPR cards that were generated were legitimate. He had the authority to send a memo having the green card created for the (indiscernible) and would send it back to him for the file. She testified that most of the people interviewed involved with all of these cases on that list, all of them did not comply with all the paperwork required. The respondent's would have been for an I-140, and this would've been for an employment-based lawful permanent resident card. There would've had to been a labor certification obtained, and this would've showed that no U.S.

worker would have lost his job; also a medical check-up would've been done; and also a copy of the degrees of the respondent, the bachelorette degrees that he would've had to enable him to adjust on an I-140. And no one copies of these papers, these copies were destroyed in 1995. Furthermore, the respondent, through counsel or anyone, has provided any of the supporting documentation or copies of such of anything that the respondent would have needed that would corroborate the respondent's position that he obtained lawfully.

Also, Ms. Brown had been involved in about 340 cases involving the Leland Sustair case. She testified that she believed that Mr. Kim's case, that he did not obtain his lawful permanent resident lawfully to begin with. The respondent always lived in St. Louis, he did not live in California, in San Jose area. This would be unusual that he would live in St. Louis and would have obtained his lawful permanent resident status in California.

He said that he worked as a translator and that he worked part-time and working part-time employment would not qualify him to be able to adjust on an I-140 either. He was doing degree work at the time, and that simply would not have been available to him. The minimum of a BA degree would have been required in Korean languages. While the respondent spoke native Korean, there is no showing of any BA degree in Korean languages. This would also not fit the classification. There has been presented no labor certification, there has been no medical that was presented or even a copy, or he has not gone back to any physician or such. The

labor certification for the Department of Labor was not shown.

The respondent also testified that he went to San Jose in August 1992, and he said in September, October of 1992, that's when he got his card. That's also unusual. He said that he went to San Jose in 1992 and obtained it in September of 1992. Court is aware that this would be unusual. He testified that he gave $5,000 cash to an individual for this and also paid the remainder, total of $10,000, in 1992. This appears to be an excessive fee to obtain for and I-140 adjustments.

Respondent did have a BA at the time in St. Louis in business administration. He eventually got his MBA in St. Louis University and also a Master of Finance at the University of Illinois. He has a business that was located in California to translate Korean to English and vice versa. That was a job respondent testified that he did for Ms. Yang.

The question is whether respondent on or about August 6th, 1992, an officer with the Immigration and naturalization caused an immigration to be created showing that you were adjusted lawful permanent resident status as a professional who holds a bachelor degree or is a member of a profession. This is immigrant visa classification E-37. When the legal or factual basis existed creating such an immigration, the Court has to agree that the evidence is clear and convincing that this has been in fact, proven by the Government. It is clear to the Court that the respondent was on the list. There has been no evidence from the respondent concerning any evidence showing that would have supported, and

the Court realized that ordinarily you don't present this, but he had no evidence showing that he had any of the documentation or did not provide any evidence showing that his would have been provided. Furthermore, the testimony of Ms. Brown indicates that the respondent's name was on the list, and she went through the various reasons why he did not obtain his lawful permanent resident status correctly.

Clearly, you did not have the bachelor degree in Korean languages; also he worked part-time. This legally and factually baseless immigration record was fraudulently created for the purpose of improperly issuing you a Form-I-551 resident alien card. The Court finds that the Court has also carried this by clear and convincing evidence (indiscernible) this legally and factually baseless immigration record was fraudulent created as a direct result of a monetary bribe paid by you or an agent, action on your behalf to an officer with the immigration and naturalization Service. I find by clear and convincing evidence that this also has been proven; eight, as a result of a legally and factually baseless immigration record that was fraudulent on or about August the 6th, 1992, you were improperly issued a Form I-551, resident alien card by the Immigration and Naturalization Service on your alien registration file A 72 095 200. I find by clear and convincing evidence that this is true; and ten, at that time you presented your fraudulently obtained I-551 resident alien card to an officer with the Immigration and Nationalization Service, now know as the Bureau of Immigration and Customs Enforcement as of March 20, 2003, and this was upon his entry. And I do find

that by clear and convincing evidence that this correct; and number 11, you did not at that time possess a present a valid immigrant visa, reentry permit, border-crossing identification card, or other valid entry document as you were not a lawful permanent resident of the United States. It is clear to the Court that by clear and convincing evidence that this is true. And under the matter In re (indiscernible) I do find that an alien who acquired permanent resident status through fraud or misrepresentation has never been lawfully admitted for permanent residence and is therefore ineligible for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act. Clearly, and the respondent does not put the blame upon the respondent for this, but I do find that he is removable as charged as a person present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than designated by the Attorney General and also that he did not have in his possession a valid unexpired immigrant visa, reentry permit, border-crossing card, or other valid entry document required by the Act, and a valid unexpired passport or suitable travel documentation or document of identity or nationality as required under the regulations issued by the Attorney General under Section 211A of the Act. I, therefore, find that respondent is, therefore, removable as charged.

I also find that on March 4th, 2003, you arrived as a returning resident alien at the port-of-entry, Chicago (indiscernible) International Airport and at that time you were an alien who seeks to procure a visa or other documentation, admission in

the United States, or benefit under this Act by fraud or willfully misrepresenting a material fact.

I cannot find that the respondent is removable under this. I do not believe that he was perpetuated with the fraud or willfully misrepresenting a material fact. It's clear to the Court that what occurred that he was a naïve person and was a student and was very young and did not understand the legalities that were involved in becoming a lawful permanent resident. The respondent had not been in the country a great length of time at that time. I do not find that the bears any fault or that he committed any fraud in obtaining this himself, but it was some agents who acted for him who did this. I, therefore, find that he is removable as charged except under 212(a)(6)(C)(i).

ORDER

There being no other relief sought, it's, therefore, ordered by the Court that respondent be removed from the United States to South Korea on the charges contained in the Notice to Appear.

JOHN A. DUCK, JR.
United States Immigration Judge

Relevant Provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*

§ 1101. Definitions

(a) As used in this Act--

* * *

(13) (A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 212(d)(5) [8 U.S.C. § 1182(d)(5)] or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings,

(v) has committed an offense identified in section 212(a)(2) [8 U.S.C. § 1182(a)(2)], unless since such offense the alien has been granted relief under

section 212(h) or 240A(a) [8 U.S.C. § 1182(h) or 1229b(a)], or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(6) Illegal entrants and immigration violators.

(A) Aliens present without admission or parole.

(i) In general. An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

* * *

(C) Misrepresentation.

(i) In general. Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

* * *

(7) Documentation requirements.

(A) Immigrants.

(i) In general. Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission--

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a) [8 U.S.C. § 1181(a)], or

(II) whose visa has been issued without compliance with the provisions of section 203 [8 U.S.C. § 1183],

is inadmissible.

§ 1256. Rescission of adjustment of status; report to Congress; effect upon naturalized citizen

(a) If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act [8 U.S.C. § 1255 or 1259] or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an

adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 240 [8 U.S.C. § 1229a], and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

* * *

Supreme Court, U.S.
FILED
AUG 31 2009
OFFICE OF THE CLERK

(3)

No. 08-1356

In the Supreme Court of the United States

SUNGWOOK KIM, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 8 U.S.C. 1256(a)'s five-year limitation on the government's authority to rescind the grant of an adjustment to permanent resident status also precludes the initiation of removal proceedings under 8 U.S.C. 1229a based on the unlawfulness of that adjustment.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Arellano-Garcia v. *Gonzales*, 429 F.3d 1183 (8th Cir. 2005) 10
Asika v. *Ashcroft*, 362 F.3d 264 (4th Cir. 2004), cert. denied, 543 U.S. 1049 (2005) ..... *passim*
Bamidele v. *INS*, 99 F.3d 557 (3d Cir. 1996) 8, 9
Belenzo, In re , 17 I. & N. Dec. 374 (Att'y Gen. 1981) 15
Biggs v. *INS*, 55 F.3d 1398 (9th Cir. 1995) 8
BP America Prod. Co. v. *Burton*, 549 U.S. 84 (2006) 16
Chevron U.SA., Inc. v. *NRDC*, 467 U.S. 837 (1984) 7
De Guzman v. *Attorney Gen.*, 263 Fed. Appx. 222 (3d Cir. 2008) 8
Garcia v. *Attorney Gen.*, 553 F.3d 724 (3d Cir. 2009) 7, 8, 9, 12
Iavorski v. *INS*, 232 F.3d 124 (2d Cir. 2000) 10
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 16
Kim v. *Ashcroft*, 95 Fed. Appx. 418 (3d Cir. 2004) 10
Koloamatangi, In re, 23 I. & N. Dec. 548 (B.I.A 2003) 11
Oloteo v. *INS*, 643 F.2d 679 (9th Cir. 1981) 12
Omar v. *INS*, 266 Fed. Appx. 37 (2d Cir. 2008) 11, 13

Cases—Continued: Page

S—, In re, 9 I. & N. Dec. 548 (Att'y Gen. 1962) 7, 13, 14, 15
Sanchez v. *Winfrey*, 134 Fed. Appx. 720 (5th Cir. 2005) 11
Savoury v. *Attorney Gen.*, 449 F.3d 1307 (11th Cir. 2006) 10
Stolaj v. *Holder*, No. 08-3858, 2009 WL 2513608 (6th Cir. Aug. 19, 2009) 8

Statutes and regulations:

Homeland Security Act, Pub. L. No. 107-296, § 1102, 116 Stat. 2273 ..... 2, 16
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 378(a), 110 Stat. 3009-649 2
Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163:
§ 242, 66 Stat. 208 12
§ 246(a), 66 Stat. 217 ..... 2, 12
8 U.S.C. 1103(a)(1) 16
8 U.S.C. 1182(a)(6)(A)(i) 3, 4, 5, 7
8 U.S.C. 1182(a)(6)(C)(i) 4
8 U.S.C. 1182(a)(7)(A)(i)(I) 4, 5, 7
8 U.S.C. 1229a 2, 11, 12, 13
8 U.S.C. 1229b(a) 5
8 U.S.C. 1255 2
8 U.S.C. 1256 13
8 U.S.C. 1256(a) ..... *passim*
8 U.S.C. 1259 2

Regulations—Continued: Page

8 C.F.R.:
Pt. 246 14
Section 246.12(a) (1958) 14
Section 246.12(b) (1958) 14

In the Supreme Court of the United States

No. 08-1356

SUNGWOOK KIM, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 560 F.3d 833. The opinion of the Board of Immigration Appeals (Pet. App. 14a-20a) is unreported. The opinion of the immigration judge (Pet. App. 21a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2009. The petition for a writ of certiorari was filed on May 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1256(a) of Title 8 states:

> If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of [S]ection 1255 or 1259 of this title or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under [S]ection 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 U.S.C. 1256(a).

Although Section 1256(a) was originally enacted in 1952, its last sentence was added by a 1996 amendment. See Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 246(a), 66 Stat. 217, amended by Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 378(a), 110 Stat. 3009-649.[1]

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[1] In 2003, the Immigration and Naturalization Service was abolished and its functions were transferred to the Department of Homeland Security (DHS). Pet. App. 2a n.3; see Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002). The text of 8 U.S.C. 1256(a),

2. Petitioner, a native and citizen of South Korea, was admitted into the United States as a non-immigrant student in 1988. Pet. App. 2a. In 1992, petitioner applied to adjust his status to that of a lawful permanent resident, based on his purported employer's immigrant visa sponsorship. *Ibid.* Petitioner, although residing in St. Louis, Missouri, traveled to San Jose, California, to apply for permanent residence at the San Jose district office of the Immigration and Naturalization Service (INS). *Ibid.* Petitioner's application to adjust his status was approved that same year. *Ibid.*

At that time, Leland Sustaire was employed as a Supervisory District Adjudications Officer with the INS office in San Jose. Pet. App. 3a. Sustaire was responsible for approving applications for adjustment of status. *Ibid.* In 1998, Sustaire was convicted for having "accept[ed] bribes in exchange for issuing green cards." *Ibid.* During the course of his criminal proceeding, Sustaire testified that he had accepted bribes to approve the applications of aliens who were not qualified to become permanent residents and that many of the granted applications were incomplete in that they were missing the requisite labor certifications and other necessary documents. Administrative Record (A.R.) 399-400, 409-410.

In March 2003, believing that petitioner was one of those aliens whose application for permanent residence was fraudulently approved by Sustaire, the Department of Homeland Security (DHS) served petitioner with a Notice to Appear. The notice charged petitioner with removability as an alien present in the United States without being lawfully admitted or paroled, 8 U.S.C.

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however, has not yet been amended to reflect that rescission authority now lies with the Secretary of DHS and not the Attorney General.

1182(a)(6)(A)(i), and as an alien not in possession of a valid entry document, 8 U.S.C. 1182(a)(7)(A)(i)(I). A.R. 619-622. DHS subsequently lodged an additional charge of removability under 8 U.S.C. 1182(a)(6)(C)(i) for attempting to acquire an immigration benefit through fraud. A.R. 617-618.

During petitioner's removal proceeding, DHS proffered, *inter alia*, the following evidence in support of the charges of removability: (1) a Form I-213 (Record of Deportable/Inadmissible Alien); (2) "a list of alien numbers, prepared by Sustaire, representing those persons from whom Sustaire received bribes"; (3) "from the bribery trials, the government's Motion for Downward Departure, a transcript of Sustaire's testimony, and a copy of the judgments"; and (4) the testimony of DHS Agent Lesley Brown on "the bribery scheme," petitioner's connection to that scheme, and why petitioner "was ineligible for a status adjustment at the time it was issued to him in 1992." Pet. App. 3a; see A.R. 122-149, 293-517.

3. The immigration judge (IJ) rendered an oral decision in which he sustained the charges of removability under 8 U.S.C. 1182(a)(6)(A)(i) and (7)(A)(i)(I). Pet. App. 21a-27a.[2]

The IJ found "unusual" several facts relating to petitioner's adjustment to lawful permanent resident status, including that petitioner had obtained his green card in San Jose despite living in St. Louis at the time; that he had received the green card just one or two months after applying; and that he had paid an "excessive" fee of $10,000 for the adjustment. Pet. App. 23a-24a. The IJ further observed that petitioner had not during the

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[2] The IJ determined that the additional charge under 8 U.S.C. 1182(a)(6)(C)(i) had not been proven. Pet. App. 27a.

course of his removal proceeding provided "any of the supporting documentation or copies of * * * anything that * * * would corroborate [his] position that he obtained lawfully" his employment-based permanent resident status (*e.g.*, labor certification or bachelor's degree). *Id.* at 22a-23a. The IJ also credited the government's corroborating evidence, including Agent Brown's testimony linking Sustaire's bribery scheme to petitioner's case and that petitioner appeared on the list (sorted by alien number), prepared by Sustaire, of fraudulently issued green cards. *Id.* at 22a-25a.

Based on those factual findings, the IJ found "by clear and convincing evidence" that a "legally and factually baseless immigration record was fraudulent[ly] created as a direct result of a monetary bribe paid by [petitioner] or an agent" acting on his behalf. Pet. App. 25a. The IJ further concluded that because petitioner had not lawfully acquired his permanent resident status, he was statutorily ineligible for cancellation of removal under 8 U.S.C. 1229b(a). Pet. App. 26a. Accordingly, the IJ ordered petitioner removed to South Korea. *Id.* at 27a.

4. The Board of Immigration Appeals (Board) dismissed petitioner's appeal of the IJ's decision. Pet. App. 14a-20a.

The Board rejected petitioner's hearsay objections to the admission of certain evidence, upheld the IJ's factual findings, and affirmed that petitioner was inadmissible under 8 U.S.C. 1182(a)(7)(A)(i)(I) as an immigrant lacking a valid entry document. Pet. App. 15a-18a.[3]

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[3] The Board declined to consider whether petitioner was also inadmissible under 8 U.S.C. 1182(a)(6)(A)(i) as an alien present in the United States without being lawfully admitted or paroled. Pet. App. 18a n.5.

The Board then addressed petitioner's argument that DHS was not permitted to place petitioner in removal proceedings because the five-year statutory period for rescission of his permanent resident status under 8 U.S.C. 1256(a) had expired. Pet. App. 18a-19a. The Board ruled that although DHS must initiate rescission proceedings within five years of an alien's unlawful adjustment, "there is no statute of limitations applicable to the initiation of removal proceedings * * * despite an improper grant of adjustment of status by * * * DHS." *Id.* at 19a. The Board relied in part on the 1996 amendment to Section 1256(a) that added the following language: "Nothing in this subsection shall require [DHS] to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status." *Ibid.* The Board also cited the Fourth Circuit's decision in *Asika* v. *Ashcroft*, 362 F.3d 264, 269-271 (2004), cert. denied, 543 U.S. 1049 (2005), which held that Section 1256(a) restricts DHS's power to rescind an adjustment of status after five years, but does not curtail its ability to initiate removal proceedings based on the same erroneous adjustment. Pet. App. 19a.

Finally, the Board upheld the IJ's denial of cancellation of removal on the ground that petitioner was not a "lawful" permanent resident. Pet. App. 20a.

5. The court of appeals denied the petition for review. Pet. App. 1a-13a.

After noting that petitioner had not "challeng[ed] the sufficiency of the government's evidence establishing that [petitioner's] green card was illegally issued," the court of appeals upheld the IJ's admission of hearsay evidence. Pet. App. 5a-6a.

The court then rejected petitioner's argument that 8 U.S.C. 1256(a) barred the institution of his removal proceeding (because he had adjusted his status more than five years prior to its institution), declining to adopt the Third Circuit's conclusion in *Garcia* v. *Attorney General*, 553 F.3d 724 (2009), "that th[e] limitations period [of Section 1256(a)] applies to removal proceedings, not just rescission of status adjustments." Pet. App. 7a. The court relied on Section 1256(a)'s plain text, which "applie[s] the five-year limitations period to rescission only." *Id.* at 8a. The court viewed the 1996 amendment to Section 1256(a) as bolstering that conclusion because it "makes clear that the legislature viewed rescission and removal as separate." *Ibid.* The court also noted that, since 1962, the Attorney General has "interpreted [8 U.S.C. 1256(a)] to only apply to the rescission of status adjustments, not removal proceedings." Pet. App. 8a. (citing *Asika*, 362 F.3d at 269, and *In re S–*, 9 I. & N. Dec. 548 (Att'y Gen. 1962)). The court concluded that "[t]o the extent there [was] any doubt as to the plain meaning of the statute," it would defer to the Attorney General's interpretation under *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984). Pet. App. 8a-9a.[4]

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[4] Although not at issue in the certiorari petition before this Court, the court of appeals also rejected petitioner's argument that he should have been charged with removability rather than inadmissibility (Pet. App. 9a-11a); agreed with the IJ that petitioner was inadmissible under 8 U.S.C. 1182(a)(6)(A)(i) and (7)(A)(i)(I) (Pet. App. 10a-11a); and upheld the Board's ruling that petitioner was statutorily ineligible for cancellation of removal (*id.* at 11a-12a).

ARGUMENT

The court of appeals' decision is correct, and it only makes the limited disagreement among the courts of appeals more lopsided in the government's favor. This Court could benefit from further percolation of the issue in the courts of appeals in the aftermath of the 1996 amendment to 8 U.S.C. 1256(a), and there is no countervailing need for the Court to review this relatively infrequently arising issue now. Accordingly, further review is not warranted.

1. a. Rather than create a new circuit conflict, the court of appeals' decision in this case reinforces the majority view against the Third Circuit's outlying interpretation of 8 U.S.C. 1256(a). The Eighth Circuit joined the Fourth and Ninth Circuits in holding that although Section 1256(a) precludes the government from rescinding an alien's permanent resident status more than five years after the date of the alien's adjustment, it does not bar the government from thereafter initiating removal proceedings based on the same unlawful adjustment. See Pet. App. 7a-8a; *Asika* v. *Ashcroft*, 362 F.3d 264, 267-271 (4th Cir. 2004); *Biggs* v. *INS*, 55 F.3d 1398, 1401 & n.3 (9th Cir. 1995). And, most recently, the Sixth Circuit reached the same conclusion. See *Stolaj* v. *Holder*, No. 08-3858, 2009 WL 2513608, at *4-5 (Aug. 19, 2009). Only the Third Circuit has held that Section 1256(a)'s five-year limitation on rescission actions applies to removal proceedings. See *Garcia* v. *Attorney Gen.*, 553 F.3d 724, 727-728 (2009); *Bamidele* v. *INS*, 99 F.3d 557, 562-564 (1996); but see *De Guzman* v. *Attorney Gen.*, 263 Fed. Appx. 222, 225-226 (2008) (allowing removal proceedings and distinguishing *Bamidele* on ground that, unlike in that case, the government in *De Guzman*

did not become aware of the alien's ineligibility to adjust status until after the five-year period had lapsed).[5]

To date, only those five circuits have issued published decisions on the question presented. Given that the Third Circuit stands alone, both the importance and the intractability of the circuit conflict may depend on whether any other courts of appeals align themselves with the Third Circuit and whether the Third Circuit revisits the issue in response. This Court's intervention would thus be premature. That is especially true in light of the 1996 amendment to Section 1256(a), on which the court below relied. Further percolation is appropriate to allow other courts of appeals to adjudicate the issue under the current version of the statute.

b. Petitioner's secondary contention (Pet. 16-17) that the courts of appeals are divided on whether "the government's view of Section 1256(a) [is] entitled to *Chevron* deference" is not independently worthy of this Court's review—both because the issue is subsumed in the interpretation of 8 U.S.C. 1256(a) and because it is not essential to the court of appeals' decision in this case.

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[5] As in *De Guzman*, the government in this case did not become aware of petitioner's ineligibility until more than five years after the adjustment of status—thereby similarly distinguishing this case from *Bamidele*. Pet. App. 3a. The facts underlying the unlawful adjustment of status in this case also arguably distinguish it from both *Garcia* and *Bamidele*. In the Third Circuit cases, the government erroneously had granted adjustments based on fraudulent representations by the applicants that went undetected at the time of the adjustments. See *Garcia*, 553 F.3d at 726; *Bamidele*, 99 F.3d at 558. But this case does not involve such a mistaken grant; rather, petitioner's adjustment was procured through bribery of a rogue officer. Pet. App. 2a-4a. Petitioner therefore seeks an extension of the Third Circuit's rule to this distinct context.

Petitioner claims (Pet. 16) that a conflict exists inasmuch as "the Eighth and Fourth Circuits [have] concluded that *Chevron* deference should be afforded to the Attorney General's interpretation of Section 1256(a)," while the Third Circuit in *Garcia* has concluded that the Attorney General's "view of Section 1256(a) [is] not entitled to *Chevron* deference." But the court of appeals in this case relied primarily on the plain meaning of Section 1256(a), noting only as an alternative basis that, to the extent any doubt remained, it would defer to the Attorney General's interpretation under *Chevron*. Pet. App. 8a-9a. Accordingly, not only is the alleged conflict subsidiary to the question presented, it also is not essential to the court of appeals' holding below.[6]

2. Petitioner has failed to establish that the issue at hand arises frequently enough or is important enough to justify the Court's intervention in this case.

Aside from the published circuit decisions that have given rise to the conflict, petitioner cites (Pet. 18 & n.7) ten other cases in which the issue purportedly "has arisen directly or was implicated." But several of those decisions either refer to the issue only to point out that it did not actually arise in the case at all[7] or did not

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[6] Petitioner contends (Pet. 17 n.6) that the Second Circuit's decision in *Iavorski* v. *INS*, 232 F.3d 124 (2000), compounds the conflict on whether *Chevron* deference applies here. That is incorrect. *Iavorski* does not address 8 U.S.C. 1256(a); it addresses whether a limitations period is subject to equitable tolling in the very different context of motions to reopen. The interplay between rescission and removal proceedings under the INA in the context of adjustments of status concern matters uniquely within the agency's expertise.

[7] See, *e.g.*, *Savoury* v. *Attorney Gen.*, 449 F.3d 1307, 1314 (11th Cir. 2006); *Arellano-Garcia* v. *Gonzales*, 429 F.3d 1183, 1186 (8th Cir. 2005); *Kim* v. *Ashcroft*, 95 Fed. Appx. 418, 422 (3d Cir. 2004).

reach the issue due to a failure to exhaust administrative remedies on the issue.[8] Petitioner's reliance on a handful of cases since Section 1256(a)'s enactment 57 years ago does not make the issue sufficiently recurring to warrant this Court's review.

Petitioner also claims (Pet. 18) that the issue is "important" because of the consequences of removal for a person in his situation. An alien who has obtained his permanent resident status unlawfully or fraudulently, however, has no reasonable basis to rely on that status. See, *e.g.*, *In re Koloamatangi*, 23 I. & N. Dec. 548, 550 (B.I.A. 2003) ("It is illogical that Congress could have intended that an alien who committed fraud in order to obtain such status, and whose fraud was not discovered until more than 5 years had passed, could rely on having obtained such status 'lawfully' to claim eligibility for relief."). Petitioner, or others in his situation, therefore do not have a "legitimate expectation" of reliance (Pet. 19) on a fraudulent grant of permanent residence.

3. a. In any event, the court of appeals' decision is correct. The court properly relied on the plain text of 8 U.S.C. 1256(a) to conclude that the five-year time limit on rescission of adjustment of status does not apply to removal proceedings brought on the basis of the unlawfulness of that adjustment. As the court observed, "[o]n its face, § 1256(a) only discusses the five-year statute of limitations in terms of rescinding a status adjustment," and not in relation to removal proceedings under 8 U.S.C. 1229a. Pet. App. 8a; see, *e.g.*, *Asika*, 362 F.3d at 269. As the court further noted, the 1996 amendment to Section 1256(a)—adding in part that "[n]othing in this

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[8] See, *e.g.*, *Omar* v. *INS*, 266 Fed. Appx. 37, 38 (2d Cir. 2008); *Sanchez* v. *Winfrey*, 134 Fed. Appx. 720, 722 (5th Cir. 2005).

subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien"—"makes clear that the legislature viewed rescission and removal as separate, and applied the five-year limitations period to rescission only." Pet. App. 8a; see *Garcia*, 553 F.3d at 729-731 (Fuentes, J., dissenting).

The textual distinction between rescission and removal proceedings for purposes of Section 1256(a)'s limitations period is consistent with the evolution of the broader statutory scheme. Before 1952, the relevant statutes prescribed a five-year limitations period within which the Government could initiate deportation proceedings from the time that an alien became deportable. See *Oloteo* v. *INS*, 643 F.2d 679, 682-683 & n.7 (9th Cir. 1981). When Congress enacted the Immigration and Nationality Act (INA) in 1952, Congress eliminated any limitations period from the provisions governing deportation proceedings. *Ibid.* (citations omitted); see INA § 242, 66 Stat. 208 (8 U.S.C. 1229a). Congress also, however, separately provided for the first time in Section 1256(a) for action by the Attorney General to rescind an erroneous grant of adjustment of status to an alien, subject to the five-year limitations period. *Oloteo*, 643 F.2d at 683; see INA § 246(a), 66 Stat. 217. Congress's categorical elimination of a limitations period for deportation proceedings in the INA, while engrafting one on the newly created rescission procedure, supports the court of appeals' reading.

The court of appeals' interpretation avoids strange policy consequences as well. Petitioner's reading would create the anomalous result that aliens who initially entered the country as nonimmigrants and subsequently adjusted their status while in the United States would

be immune from deportation after the lapse of the five-year period, whereas aliens who initially entered the country as lawful permanent residents would be subject to deportation based on a defect in the initial grant without any time limitation. See *Asika*, 362 F.3d at 271; *In re S–*, 9 I. & N. Dec. 548, 553-554 (Att'y Gen. 1962).

In construing Section 1256(a) in 1962, the Attorney General acknowledged that the five-year limitations period for rescission actions "may be of little practical value" to many aliens because, even if an alien was insulated from rescission of status after the five-year period, "the same conduct nevertheless [could] be utilized independently as a ground for his deportation or exclusion." *In re S–*, 9 I. & N. Dec. at 555. At the same time, however, the Attorney General recognized the distinction between rescission and removal proceedings and the reason why Congress would have applied the limitations period to the former but the not latter. As the Attorney General explained, the "rescission procedure apparently resulted from congressional recognition that a means more informal and expeditious than deportation was needed to correct mistakes made in granting permanent residence to nonimmigrants through adjustment of status." *Id.* at 555 n.8; see *Asika*, 362 F.2d at 270 ("Under the Act, rescission proceedings are subject to few, if any, procedural protections, see 8 U.S.C. 1256; deportation proceedings, in contrast, are subject to extensive procedural regulations set forth in 8 U.S.C. 1229a."). Accordingly, the Attorney General correctly concluded that "the significance which Congress attached to the five-year limitation was that it cut off the availability of a procedure which, although to all intents and purposes would establish deportability, permitted the Attorney General to act more informally and expeditiously than

he could in a deportation proceeding." *In re S–*, 9 I. & N. Dec. at 555 n.8; see *Asika*, 362 F.2d at 270 ("[S]ection [1256(a)]'s five-year limitation on rescission—even if interpreted to apply only to rescission proceedings—provides an important safeguard to aliens * * * who have been in the country for more than five years after their status has been erroneously adjusted, by forcing the Attorney General to establish their deportability through the more rigorous procedures of removal rather than the less procedurally-onerous process of rescission.") (citation omitted).

In sum, Congress's decision to place a five-year limitation on the less formal rescission procedure but not on more protective removal proceedings is a reasonable accommodation between protecting an adjusted alien's expectations and preventing circumvention of the immigration laws (which may not be discovered, as here, until much later).[9]

b. The court of appeals (Pet. App. 8a-9a) was also correct in concluding that, to the extent that there is any ambiguity as to the meaning of 8 U.S.C. 1256(a), the Attorney General's interpretation is entitled to *Chevron* deference. In 1962, as discussed above (pp. 13-14, *supra*), the Attorney General determined that the five-

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[9] As the Attorney General noted, "while Congress may have permitted the Attorney General to make use of more informal procedures in rescission, in practice under the governing regulation there is little difference between the safeguards afforded an alien in deportation and that afforded him in rescission." *In re S–*, 9 I. & N. Dec. at 556 n.8 (citing 8 C.F.R. 246.12(a) and (b)); see generally 8 C.F.R. Pt. 246. "That the INS has chosen *in its discretion* to provide additional procedural protections to aliens in rescission proceedings reveals nothing about whether Congress relied on the *statutory* disparity in procedures for rescission and removal in enacting section 246(a)." *Asika*, 362 F.3d at 270 n.7.

year limitations period for rescission actions did not apply to exclusion or deportation proceedings. See *In re S–*, 9 I. & N. Dec. at 551-557. Since *In re S–*, the Attorney General and Board have adhered to the same considered view. See, *e.g.*, *In re Belenzo*, 17 I. & N. Dec. 374 (Att'y Gen. 1981); Pet. App. 19a. The 1996 amendment, by making clear that rescission is not a prerequisite to removal, confirms and strengthens the Attorney General's interpretation. Indeed, if Congress had meant to overturn that longstanding interpretation, it surely would have done so expressly.

Petitioner contends (Pet. 24) that *Chevron* deference is inapplicable because the question presented involves interpretation of a limitations provision and resolution of such questions does not require agency expertise. But Section 1256(a) does not pertain to the time period within which an alien aggrieved by agency action can seek *judicial* review; it instead relates to the time period within which the *agency* itself can carry out its responsibilities under the INA by conducting removal proceedings. See *Asika*, 362 F.2d at 271 n.8 ("The Attorney General's answer to the question presented * * * does not depend on a straightforward interpretation and application of a statute of limitations; rather, it requires the Attorney General to consider whether a five-year statute of limitations would be consistent with the statutory and regulatory framework for deportation, when applied to a few, but not all, of the cases within that framework."). The interpretation of the limitations period in Section 1256(a) thus directly affects the Attorney General's execution of the INA—an issue well within his administrative responsibility and expertise.

Congress committed the adjudication of such matters under the INA to the Attorney General (authority that

has been transferred in part to the Secretary of DHS), and *Chevron* deference therefore applies. See 8 U.S.C. 1103(a)(1) (2000) ("The Attorney General shall be charged with administration and enforcement" of the INA and "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."), amended by Homeland Security Act, Pub. L. No. 107-296, § 1102, 116 Stat. 2273 (substituting "Secretary of Homeland Security" for Attorney General in first clause); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) ("It is clear that principles of *Chevron* deference are applicable to [the INA]."). The Attorney General's reasonable and longstanding interpretation of 8 U.S.C. 1256(a) falls well within the bounds of *Chevron* and thus controls here. That conclusion is reinforced by the general rule that any ambiguities in the application of a statute of limitations are to be resolved in favor of the government. See *BP America Prod. Co.* v. *Burton*, 549 U.S. 84, 95-96 (2006) ("[W]hen the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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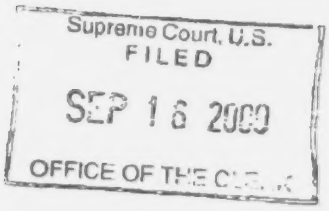
AUGUST 2009



No. 08-1356

IN THE
Supreme Court of the United States

SUNGWOOK KIM,

Petitioner,

v.

ERIC H. HOLDER, JR.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

REPLY TO BRIEF IN OPPOSITION.....1

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Page

Asika v. *Ashcroft*,
362 F.3d 264 (4th Cir. 2004) 3

Bamidele v. *INS*,
99 F.3d 557 (3d Cir. 1996) 2, 8

Bloate v. *United States*,
556 U.S. __ (April 20, 2009) 4

Cardenas-Mendoza v. *Holder*, 320 Fed. Appx.
525 (9th Cir. Mar. 20, 2009) 3

Chambers v. *United States*,
129 S.Ct. 687 (2009) 4

Chevron, U.S.A., Inc. v. *Natural Res. Def.*
Council, Inc., 467 U.S. 837 (1984) 1

Garcia v. *Attorney General*,
553 F.3d 724 (3d Cir. 2009) 2, 3

Jaramillo v. *INS*,
1 F.3d 1149 (11th Cir. 1993) 7

Kim v. *Holder*, 560 F.3d 833 (8th Cir. 2009) 3

Lorillard v. *Pons*,
434 U.S. 575 (1978) 10

Matter of S--, 9 I. & N. Dec. 548
(Att'y Gen. 1962) 10

Monet v. *INS*, 791 F.2d 752 (9th Cir. 1986) 3

Rosendo-Ramirez v. *INS*,
32 F.3d 1085 (7th Cir. 1994) 7

Stolaj v. *Holder*, No. 08-3858, 2009 U.S. App. LEXIS 18567 (6th Cir. Aug. 19, 2009) 1, 3, 7

Valente-Narcizo v. *Gonzales*, 139 Fed. Appx. 878 (9th Cir. 2005) 3

Trinidad-Contreras v. *Gonzales*, 202 Fed. Appx. 943 (9th Cir. 2006) 3

United States v. *Santos*, 128 S.Ct. 2020 (2008) 4

Watson v. *United States*, 552 U.S. 74 (2008) 4

Young v. *United States*, 535 U.S. 43 (2002) 6

STATUTES

8 U.S.C. § 1201 10

8 U.S.C. § 1256 ..... *passim*

Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3559, 3384 (1986) 7

OTHER

John M. Glionna, *Lawmakers, Religious Leaders Fight Deportations Linked to Fraud Case*, Los Angeles Times, Feb. 7, 2003 at Metro Desk p. 6 6

John M. Glionna, *Victims of Green Card Scam in 1990s Being Deported*, Los Angeles Times, Feb. 22, 2005 at B3 6

REPLY TO BRIEF IN OPPOSITION

Certiorari should be granted to resolve a persistent disagreement among the circuits on an important question of immigration law. As Respondent acknowledges, the courts of appeals are split 4-1 on the question presented. Contrary to the government's assertion, there is no reason to think that the issue will benefit from further "percolation" in the lower courts of appeals, and further delaying review by this Court would frustrate the federal policy favoring uniform application of immigration laws.

1. Respondent acknowledges that the question presented has been addressed by five courts of appeals in published opinions. Op. 8-9 (citing decisions of the Third, Fourth, Sixth, Eighth, and Ninth Circuits). As the government recognizes, the split in the circuits has widened in the relatively short time since the petition for certiorari was filed. *Id.* at 8. In *Stolaj* v. *Holder*, the Sixth Circuit acknowledged the disagreement among the circuits and joined the controversy on the side of the Eighth and other Circuits, recognizing that its decision was contrary to that of the Third Circuit. 2009 U.S. App. LEXIS 18567 at *12 (6th Cir. Aug. 19, 2009). The Sixth Circuit also joined the Fourth and Eighth Circuits, and disagreed with the Third Circuit, in holding that if the statute were ambiguous, it would defer to the Attorney General's interpretation under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 2009 U.S. App. LEXIS 18567 at *13.

The government nevertheless argues that review by this Court would be "premature." Op. 9. The government's arguments in support of this conclusion are unpersuasive.

a. Respondent suggests that the Third Circuit may decide to "revisit[]" the question presented "in response to the decisions of other courts of appeals." Op. 9. Recent developments indicate that this is unlikely to happen. Earlier this year, the Third Circuit reaffirmed its position in *Garcia* v. *Attorney General*, 553 F.3d 724 (3d Cir. 2009). In *Garcia*, the Third Circuit considered the effect of the 1996 amendments to § 1256(a) and held that they do not undermine the court's earlier decision in *Bamidele* v. *INS*, 99 F.3d 557 (3d Cir. 1996). *See Garcia*, 553 F.3d at 728. *Garcia* thus answers the government's contention that because *Bamidele* was decided before the 1996 amendments it is "unclear whether the Third Circuit would reach the same result after those amendments." Brief for the Respondent in Opposition, *Asika* v. *Ashcroft*, No. 04-256 (Dec. 2004). In *Garcia*, moreover, the Third Circuit adhered to its position even though it had the benefit of the Fourth and Ninth Circuit decisions issued since *Bamidele*. In addition, the Third Circuit denied the government's petition for rehearing en banc in *Garcia* by a vote of 10-2. *See* Order Denying Rehearing En Banc, *Garcia* v. *Attorney General*, (3d Cir. Feb. 4, 2009). Having so recently decided to adhere to its position despite the disagreement of other circuits, and having decisively rejected the government's petition for rehearing, it is unlikely

that the Third Circuit will decide to revisit the issue.[1]

b. The government also asserts that "[f]urther percolation is appropriate" to allow other courts of appeals to consider the 1996 amendments to Section 1256(a). Op. 9. But four of the five circuits that have decided the question in published opinions have done so *after* the 1996 amendment to Section 1256(a). *See Stolaj*, 2009 U.S. App. LEXIS 18567; *Kim* v. *Holder*, 560 F.3d 833 (8th Cir. 2009); *Garcia*, 553 F.3d 724 (3d Cir. 2009); *Asika* v. *Ashcroft*, 362 F.3d 264, 270-71 (4th Cir. 2004). The fifth court of appeals—the Ninth Circuit—held in an unpublished opinion that "[t]he 1996 amendment essentially codified our holding in *Monet* v. *Immigration & Naturalization Service*, 791 F.2d 752, 754 (9th Cir. 1986), that the pre-1996 statute did not bar deportation proceedings against an adjusted alien after the statute of limitations expired." *Trinidad-Contreras* v. *Gonzales*, 202 Fed. Appx. 943, 945 (9th Cir. 2006).[2] There is no reason to delay resolution of

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[1] In another case currently pending before this Court, the government has argued that "the mere possibility" that a court of appeals "might in the future decide that it erred . . . is not a sound basis for denying review." Reply Brief for the Petitioner, *Astrue* v. *Ratliff*, No. 08-1322 at 6 (August 2009). In this case, as in *Astrue*, a court of appeals acknowledged "that its holding conflicts with the decisions of the majority of courts to have addressed the issue," and denied a petition for rehearing en banc. *Id.* In *Astrue*, the government argues that those factors *favor* of a grant of certiorari. *Id.* The same is true in this case.

[2] The Ninth Circuit has applied *Monet* several times since 1996 in unpublished opinions. *See, e.g.*, *Cardenas-Mendoza* v. (continued...)

a persistent circuit split on an important issue to allow more courts of appeals to consider the relevance of a 13-year old amendment to the statute.[3]

2. The government contends in a footnote that this case may be distinguishable from the Third Circuit's decisions in *Garcia* and *Bamidele* because the government "did not become aware of petitioner's ineligibility until more than five years after the adjustment of status." Op. 9 n.5. That is incorrect. Mr. Sustaire, the corrupt INS officer, turned himself in on February 9, 1998. *See* United States' Motion for Downward Departure, *United States* v. *Sustaire*, No. CR-98-20117 (N.D. Cal. Jan. 26, 2000), C.A. App. 376. The government initiated deportation proceedings against Mr. Kim on March 21, 2003. Pet. App 21a; C.A. App. 621. The government thus

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Holder, 320 Fed. Appx. 525, 527 (9th Cir. 2009) (unpublished); *Trinidad-Contreras*, 202 Fed. Appx at 945; *Valente-Narcizo* v. *Gonzales*, 139 Fed. Appx. 878, 880 (9th Cir. 2005) (unpublished).

[3] The government also suggests that certiorari should be denied because the circuit split is lopsided. Op. 8. The Court has often granted certiorari where a circuit split favored the respondent more heavily than the petitioner, and has also resolved "lopsided" splits in favor of the minority position. *See, e.g.*, *Chambers* v. *United States*, 129 S.Ct. 687 (2009) (resolving 6-1 split in favor of minority position); *United States* v. *Santos*, 128 S.Ct. 2020 (2008) (resolving 3-1 split in favor of minority position); *Watson* v. *United States*, 552 U.S. 74 (2008) (resolving in 6-3 split in favor of minority position); *see also Bloate* v. *United States*, 556 U.S. __ (April 20, 2009) (granting certiorari where 8-2 split favors respondent).

waited more than five years after it learned about Sustaire's bribery scheme before initiating proceedings against Mr. Kim. Thus, even assuming that the five-year limitations period of Section 1256(a) was tolled until the government learned of the bribery scheme, the proceedings against Mr. Kim were initiated outside the limitations period.

The government also contends that the this case can be distinguished from *Garcia* and *Bamidele* because those cases involved fraudulent representations by the applicants, while this case involves bribery. Op. 8 n.9. The Third Circuit's decisions in *Garcia* and *Bamidele* were not dependent on the petitioners' misrepresentations in those cases. Moreover, the facts of this case present an even stronger case for enforcing the limitations period than the Third Circuit cases: The Immigration Judge here found that Mr. Kim had no knowledge of any wrongdoing in connection with his application.[4] Pet. App. 27a.

3. The question presented by the Petition is important and recurring. The government argues

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[4] The government incorrectly states (Op. 5) that the list prepared by the corrupt INS officer Sustaire was "sorted by alien number." The list was not sorted in any discernable manner. *See* C.A. App. 384-88. To the extent the government takes issue with Petitioner's assertion (Pet. 7 n.3) that the number alleged to be Mr. Kim's alien number, 72 095 200, could also be read as 72 *098* 200, it is worth noting that the page on which Mr. Kim's number allegedly appears contains alien numbers beginning with both 72 095 and 72 098, and like the other pages is not sorted. C.A. App. 387.

that the question does not arise frequently enough to warrant this Court's review, but it admits that the issue has been addressed by no fewer than five circuits in published decisions, including three in the past year. *See* Op. 8-9. The issue has also arisen in numerous unpublished decisions in the courts of appeals in recent years. *See* Pet. 18 & n. 7 (collecting cases). The government quibbles over some of these examples, but it does not dispute that the issue arose on the facts of most of these cases. *See* Op. 10-11 & nn.7-8. The published and unpublished cases thus demonstrate that the issue arises with increasing regularity.[5]

The government does not dispute that deportation can have enormous and devastating consequences for individuals who have built their lives and families in the United States. It asserts, however, that no alien "who has obtained his permanent status unlawfully or fraudulently" has a "reasonable basis to rely on that status." Op. 11. This ignores the fact that Congress enacted a five-year limitations period applicable to rescission of grants of permanent resident status and did not

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[5] The Sustaire bribery scheme alone involved some 275 individuals. Most of these individuals, like Petitioner, appear to have been unaware of any impropriety in their adjustment of status. *See* John M. Glionna, *Victims of Green Card Scam in 1990s Being Deported*, Los Angeles Times, Feb. 22, 2005 at B3 (quoting immigration broker convicted in the scheme stating that the individuals "were completely in the dark."); *see also* John M. Glionna, *Lawmakers, Religious Leaders Fight Deportations Linked to Fraud Case*, Los Angeles Times, Feb. 7, 2003 at Metro Desk p. 6.

include an exception for aliens who have obtained that status unlawfully or fraudulently. The government also ignores the Immigration Judge's finding that Petitioner was unaware of the alleged bribery in this case, and so had no reason to think that his permanent resident status was in jeopardy. *See* Pet. App. 27a.

Immigration laws "often affect individuals in the most fundamental ways," and therefore "to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide." *Jaramillo* v. *INS*, 1 F.3d 1149, 1155 (11th Cir. 1993); *see also Rosendo-Ramirez* v. *INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount"); Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384 (1986) ("It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and *uniformly*." (emphasis added)). Absent review by this Court, individuals in Petitioner's circumstances will be subject to deportation in the in the Fourth, Sixth, Eighth, and Ninth Circuits, but not in the Third Circuit. That divergence on an important question of immigration law should not be allowed to persist.

4. The government does not dispute that this case also implicates a second circuit split on the applicability of *Chevron* to the Attorney General's interpretation of Section 1256(a). Op. 9-10. The Second and Third Circuits have held that *Chevron* deference is not warranted where the question is a legal one, like the statute of limitations question

here, upon which the agency has no particular expertise. *See* Pet. 16-17 & n.6. The Fourth, and Eighth Circuits, now joined by the Sixth Circuit, *see Stolaj*, 2009 U.S. App. LEXIS 18567 at *13, have applied *Chevron* in those circumstances. While the government asserts that *Chevron* should apply because the limitations period applies to the Attorney General rather than to the immigrant (Op. 15), it advances no reason for such a distinction. Indeed, in determining the scope of a limitations period it makes little sense to defer to the party who is limited by the statute. Moreover, as noted in the brief of amici curiae, deferring to the agency's interpretation would be contrary to the canon that ambiguities in immigration statutes are resolved against deportation. *See* CAIR Br. at 13 (collecting cases).

5. The government's arguments that the Eighth Circuit's decision in this case is correct are unpersuasive. As the Third Circuit recognized, when five years have elapsed since the grant of permanent resident status, permitting a deportation proceeding on the ground that permanent resident status was improperly granted effectively construes the limitations period of Section 1256(a) out of existence. *Bamidele*, 99 F.3d at 564. The government postulates four reasons why Congress might have intended this result, but none is convincing.

First, the government argues that the text of Section 1256(a) refers only to rescission, and that the 1996 amendment shows that rescission and deportation are separate. Op. 12. But the statute mentions both rescission and removal proceedings. 8

U.S.C. § 1256(a). Indeed, by stating that rescission is not necessary before instituting removal and that a deportation order is "sufficient to rescind the alien's status," the 1996 amendment made it clear that a removal order effectively results in rescission of the alien's permanent resident status. *Id.*

Second, the government invokes "the evolution of the broader statutory scheme," arguing that the 1952 revisions to the Immigration and Nationality Act, which eliminated the limitations period for deportation and created a five-year limitations period for rescission, support its interpretation. Op. 12. These revisions actually support the opposite conclusion. By eliminating the statute of limitations for deportation proceedings generally but creating a new limitations period for rescission, Congress intended that permanent residents should have immigration peace after five years *even if* it appeared thereafter to the Attorney General that they were not entitled to the status at the time it was granted. Permitting a deportation end-run around the rescission procedure frustrates Congress's purpose.

Third, the government contends that "strange policy consequences" would arise from enforcing the limitations period because immigrants who initially enter as permanent residents (and thus never undergo an adjustment of status) would not benefit from the limitations period. Op. 12-13. But limiting rescission relief to immigrants who have adjusted their status makes sense because applications for adjustment of status are processed entirely by the Department of Homeland Security ("DHS"), while immigrant petitions from individuals who are not

already in the United States are processed by the State Department. *See* 8 U.S.C. § 1201(a)(1)(A), (g). It is entirely reasonable to limit the time allowed for DHS to reconsider its own decision on an adjustment of status. The limitations period encourages DHS to review the application thoroughly and accurately in the first instance and to act promptly on any errors.

The same is not true of aliens who enter the country as permanent residents. When an alien enters the country on an immigrant visa, DHS is not responsible for conducting a full investigation of the alien's qualifications. *See id.* If DHS later receives information indicating that the State Department overlooked relevant information or made a mistake, it is reasonable to permit DHS initiate removal proceedings based on proof that the alien was not entitled to the immigrant visa at the outset.

Fourth, the government relies on the Attorney General's 1962 opinion stating that differences between the "informal" rescission procedure and the more formal deportation procedure justify a statute of limitations on one but not the other. Op. 13-14. The government admits, however, that the Attorney General noted that "in practice under the governing regulation there is little difference between the safeguards afforded an alien in deportation and that afforded him in rescission." *Id.* at 14 n.9 (quoting *Matter of S--*, 9 I. & N. Dec. 548 (Att'y Gen. 1952). The government argues that the adoption of equivalent administrative protections does not elucidate the statutory scheme. But by the time Congress amended Section 1256(a) in 1996, the protections had been in existence more than 40 years

and Congress is presumed to have been aware of them. *See, e.g., Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978). The 1996 amendment recognized and codified that a removal order has the effect of rescinding the alien's permanent resident status. Where the deportation is based on grounds that the Attorney General is time-barred from pursuing in rescission, the limitation applies equally to the deportation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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130

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In the Supreme Court of the United States

SUNGWOOK KIM,

Petitioner,

v.

ERIC H. HOLDER, JR.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CAPITAL AREA IMMIGRANTS' RIGHTS COALITION AND CASA DE MARYLAND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Petition Illuminates Two Mature Circuit Splits That Promise To Endure Until This Court Resolves Them. 6

A. The Courts Of Appeals Have Sharply Divided On The Applicability Of Section 1256 To Removal Actions. 6

B. The Courts Of Appeals Also Have Inconsistently Applied *Chevron* And The Rule Of Lenity When Reviewing Agency Interpretations Of The INA. 9

II. The Petition Raises Important And Recurring Issues That, If Resolved By This Court, Will Promote Fairness And Consistency In The Application Of The Immigration Laws 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Ali v. *Reno*, 22 F.3d 442 (2d Cir. 1994) 14
Asika v. *Ashcroft*,
362 F.3d 264 (4th Cir. 2004) 4, 7, 8, 10
Bah v. *Mukasey*,
529 F.3d 99 (2d Cir. 2008) 17
Bamidele v. *INS*,
99 F.3d 557 (3d Cir. 1996) ..... *passim*
Benslimane v. *Gonzales*,
430 F.3d 828 (7th Cir. 2005) 17
Bonetti v. *Rogers*, 356 U.S. 691 (1958) 13
Chen v. *Dep't of Justice*,
426 F.3d 104 (2d Cir. 2005) 17
Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*,
467 U.S. 837 (1984) ..... *passim*
Choe v. *INS*,
11 F.3d 925 (9th Cir. 1993) 6
Costello v. *INS*, 376 U.S. 120 (1964) 13
De Osorio v. *INS*,
10 F.3d 1034 (4th Cir. 1993) 15
Dion v. Sec'y of HHS,
823 F.2d 669 (1st Cir. 1987) 5, 9
Elias v. *Gonzales*, 490 F.3d 444 (6th Cir. 2007) 18
Fiadjoe v. *Att'y Gen.*,
411 F.3d 135 (3d Cir. 2005) 17
Fong Haw Tan v. *Phelan*, 333 U.S. 6 (1948) 13
Garcia v *Att'y Gen.*,
553 F.3d 724 (3d Cir. 2009) 4, 7, 9

TABLE OF AUTHORITIES—continued

Page(s)

Goncalves v. *Reno*,
144 F.3d 110 (1st Cir. 1998) 11, 12
Graham v. *Richardson*, 403 U.S. 365 (1971)..... 16
Hellenic Lines Ltd. v. *Rhoditis*,
398 U.S. 306 (1970)..... 2
Henry v. *INS*, 8 F.3d 426 (7th Cir. 1993) 11
Iao v. *Gonzales*, 400 F.3d 530 (7th Cir. 2005) 18
Iavorski v. *INS*,
232 F.3d 124 (2d Cir. 2000) 4, 11
INS v. *Aguirre-Aguirre*,
526 U.S. 415 (1999)..... 14
INS v. *Cardoza-Fonseca*,
480 U.S. 421 (1987)..... 12, 13, 14, 18
INS v. *Errico*, 385 U.S. 214 (1966) 13
INS v. *St. Cyr*, 533 U.S. 289 (2001)..... 13, 14
Jurado-Gutierrez v. *Greene*,
190 F.3d 1135 (10th Cir. 1999)..... 11, 12
Korytnyuk v. *Ashcroft*,
396 F.3d 272 (3d Cir. 2005) 17
Kourski v. *Ashcroft*,
355 F.3d 1038 (7th Cir. 2004)..... 18
Leocal v. *Ashcroft*,
543 U.S. 1 (2004)..... 13, 15
Matter of S--, 9 I. & N. Dec. 548
(Att'y Gen. 1962) 4
Mayers v. *INS*,
175 F.3d 1289 (11th Cir. 1999)..... 11
Mece v. *Gonzales*,
415 F.3d 562 (6th Cir. 2005)..... 18

TABLE OF AUTHORITIES—continued

Page(s)

Ming Shi Xue v. *BIA*,
439 F.3d 111 (2d Cir. 2006) 17
Monet v. *INS*, 791 F.2d 752 (9th Cir. 1986) 6
N'Diom v. *Gonzales*,
442 F.3d 494 (6th Cir. 2006)..... 17
Naderpour v. *INS*, 52 F.3d 731 (8th Cir. 1995)..... 15
Ng Fung Ho v. *White*, 259 U.S. 276 (1922)..... 2, 18
Oloteo v. *INS*, 643 F.2d 679 (9th Cir. 1981) 6
Omar v. *INS*, 266 Fed. Appx. 37 (2d Cir. 2008) 8
Omar v. *INS*, 298 F.3d 710 (8th Cir. 2002)..... 15
Pak v. *Reno*, 196 F.3d 666 (6th Cir. 1999)..... 11
Patel v. *Ashcroft*, 294 F.3d 465 (3d Cir. 2002)..... 12
Recinos de Leon v. *Gonzales*,
400 F.3d 1185 (9th Cir. 2005)..... 18
Rosario v. *INS*, 962 F.2d 220 (2d Cir. 1992) 14
Sanchez v. *Winfrey*,
134 Fed. Appx. 720 (5th Cir. 2005) 8
Savoury v. *Att'y Gen.*,
449 F.3d 1307 (11th Cir. 2006)..... 8
Sherifi v. *INS*, 260 F.3d 737 (7th Cir. 2001) 11, 12
Sholla v. *Gonzales*,
492 F.3d 946 (8th Cir. 2007)..... 18
Ssali v. *Gonzales*, 424 F.3d 556 (7th Cir. 2005) 18
Tapia Garcia v. *INS*,
237 F.3d 1216 (10th Cir. 2001)..... 12
U.S. Dep't of the Navy v. *Fed. Labor Relations Auth.*, 840 F.2d 1131 (3d Cir. 1988) 9

TABLE OF AUTHORITIES—continued

Page(s)

Wang v. *Att'y Gen.*,
423 F.3d 260 (3d Cir. 2005) 17

STATUTES, RULES AND REGULATIONS

8 C.F.R. 3.1(h)(1)(i)-(iii) 13
8 U.S.C. 1101(a)(43) 12
8 U.S.C. 1158(a) 12
8 U.S.C. 1253(h) 12
8 U.S.C. 1256 ..... 8, 11
8 U.S.C. 1256(a) ..... *passim*
U.S. Const. art. I, § 8, c1 16

OTHER AUTHORITIES

Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 537 (2001) 16

BRIEF OF THE CAPITAL AREA IMMIGRANTS' RIGHTS COALITION AND CASA DE MARYLAND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae Capital Area Immigrants' Rights (CAIR) Coalition is an association of legal organizations, advocacy groups, and social service providers serving the immigrant community in the Washington, D.C. metropolitan area. CAIR was first formed in 1987, under the auspices of the Lawyers Committee for Civil Rights and Urban Affairs, and became an independent non-profit organization in 2000. The CAIR Coalition acts as the primary source of legal representation for detained immigrants in the Washington metropolitan area – including many legal permanent residents awaiting removal proceedings and deportation.

As Maryland's largest non-profit organization focused on the rights of immigrants, *amicus curiae* CASA de Maryland, Inc. has sought since 1987 to create economically and ethnically diverse communities in which all people can participate and benefit fully, regardless of their immigration status. CASA upholds this vision by, among other things, providing employment placement, vocational

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

training, financial literacy programs, English for Speakers of Other Languages instruction, citizenship classes, legal services, health education, social services, and community organizing. In addition, CASA's legal department has a deep commitment to protecting and advancing the rights of immigrants in Maryland through civil rights impact litigation.

Because of their extensive advocacy and legal work on behalf of immigrant communities in the Washington metropolitan area, *amici* have a keen interest in the fair and just administration of the nation's immigration laws. Accordingly, *amici* urge the Court to grant Mr. Kim's petition for certiorari, reverse the Eighth Circuit's decision below, and vacate the Immigration Judge's order of removal.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court recognized nearly a century ago that the deportation of one who "claims to be a citizen obviously deprives him of liberty." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). These due process considerations are no less weighty in the case of an alien who has obtained lawful permanent resident ("LPR") status. See *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 309-310 (1970). Congress recognized as much when it established a five-year limitations period within which the Attorney General must act to rescind the LPR status of an alien who, at the time, was not eligible for adjustment to such status. See 8 U.S.C. 1256(a). The limitations period, and the due process interest it protects, are meaningless if the Attorney General can ***remove*** an alien more than five years after he obtained LPR status on the ground that the alien was ineligible for that status.

Section 1256(a) of the Immigration and Nationality Act ("INA") unambiguously applies to proceedings brought by the Attorney General to revoke an alien's status as a lawful permanent resident ("LPR") on the ground that the alien was not eligible for LPR status. The question whether the five-year limitations period also applies to removal proceedings based on a lack of eligibility for LPR status, however, has directly split the circuit courts. In this case, the petitioner, Mr. Sungwook Kim, was granted LPR status in 1992. Pet. 4. Unbeknownst to Mr. Kim, persons holding themselves out as attorneys who handled his LPR application apparently bribed a then-agent of the Immigration and Naturalization Service ("INS", now known as the U.S. Citizenship and Immigration Services division of the Department of Homeland Security) to secure the approval of Mr. Kim's application. Eleven years later, after the INS agent admitted to accepting bribes in exchange for approving LPR applications, the government initiated removal proceedings against Mr. Kim on the ground that he was not an LPR and therefore was not admissible into the United States. Pet. 5.

The Eighth Circuit held that Section 1256(a) did not reach Mr. Kim's situation, reasoning that the limitations period "appl[ies] to the rescission of status adjustments" only, "not [to] removal proceedings." Pet. 8a. In so holding, the court rejected Mr. Kim's argument that, by not applying the five-year statute of limitations to removal proceedings where the government seeks to deport an LPR because he or she was improperly granted an adjustment of status, the court effectively would write the limitations period of Section 1256(a) out of

existence. The Eighth Circuit thus affirmed the Immigration Judge's decision to remove Mr. Kim. Pet. 13a.

The Eighth Circuit expressly declined to follow, and its holding squarely conflicts with, the conclusion reached by the Third Circuit in *Bamidele* v. *INS*, 99 F.3d 557 (3d Cir. 1996) and reiterated in *Garcia* v. *Attorney General*, 553 F.3d 724 (3d Cir. 2009). See Pet. 7a. At the same time, the Eighth Circuit aligned itself with the conclusion reached by the Ninth Circuit in earlier cases. See Pet. 8a. The decision below thus deepens an existing circuit split on a frequently recurring question of statutory interpretation.

The Eighth Circuit's holding also highlights and exacerbates a related, broader split among the circuit courts. In reaching its decision, the court below relied heavily on a 1962 opinion from the Attorney General interpreting Section 1256(a) as applying only to rescission proceedings. See Pet. 8a-9a (citing *Matter of S--*, 9 I. & N. Dec. 548, 548 (Att'y Gen. 1962)). Like the Fourth Circuit in *Asika* v. *Ashcroft*, 362 F.3d 264, 270-271 (4th Cir. 2004), the Eighth Circuit found that the Attorney General's interpretation was entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). By contrast, both the Second and Third Circuits have held that the Attorney General's interpretation of Section 1256(a) does ***not*** warrant *Chevron* deference, because "[a] statute of limitations is not a matter within the particular expertise of the INS." *Bamidele*, 99 F.3d at 561 (internal quotation omitted); accord *Iavorski* v. *INS*, 232 F.3d 124, 133 (2d Cir. 2000). These courts instead have held that the limitations period

is "a clearly legal issue that courts are better equipped to handle." *Bamidele*, 99 F.3d at 561 (quoting *Dion v. Sec'y of HHS*, 823 F.2d 669, 673 (1st Cir. 1987).

The circuit split over the role of *Chevron* in interpreting the limitations provisions of Section 1256(a) is an offshoot of a larger split over when deference is due to agency interpretations of the INA. Interpretive and other legal questions abound in INA cases, and the Courts of Appeals are in fundamental disagreement as to whether *Chevron* deference applies to pure questions of law arising under the immigration statutes. Some hold that *Chevron* applies across the board, while others have ruled that deference is due only where an ambiguous statute implicates policy considerations that are within the agency's area of expertise.

The importance of this split is heightened by the fact that, if *Chevron* deference does not apply, ambiguities in the INA must be resolved in accordance with the rule of lenity. That canon of interpretation, which counsels that ambiguous statutory provisions must be construed in favor of the alien, is squarely at odds with the outcome that would be reached by applying *Chevron* deference in the vast majority of immigration cases that reach the federal courts.

Moreover, the constitutional requirement that Congress implement a "uniform rule of naturalization," the frequently unreliable nature of decision-making in the immigration courts, and the severe and apparently arbitrary way that removal actions affect green-card holders in situations like Mr. Kim's further demonstrate the importance of

resolving the circuit split over the application of *Chevron* in the INA context.

ARGUMENT

I. The Petition Illuminates Two Mature Circuit Splits That Promise To Endure Until This Court Resolves Them.

A. The Courts Of Appeals Have Sharply Divided On The Applicability Of Section 1256 To Removal Actions.

The disagreement among the circuit courts over the scope of the five-year limitations period is direct and unavoidable. On the basis of a 1997 amendment to the limitations provision, the Eighth Circuit's decision stated squarely that the "plain meaning" of the statute compels the conclusion that "rescission [of status] and removal [are] separate" and that the limitations period only applies to the former. Pet. 8a. The Eighth Circuit's decision conforms with cases in the Ninth Circuit that read Section 1256 to "plainly, unequivocally and unambiguously" mean that "Congress has seen fit to do away with statutes of limitation with regard to deportation proceedings." *Oloteo* v. *INS*, 643 F.2d 679, 682-683 (9th Cir. 1981); see also, *e.g.*, *Choe* v. *INS*, 11 F.3d 925, 928 n.4 (9th Cir. 1993) ("The bottom line is [Section 1256] does not prevent the removal of adjusted aliens."); *Monet* v. *INS*, 791 F.2d 752, 754 (9th Cir. 1986) (extending "*Oloteo* to exclude application of the five year limitations period to deportation proceedings regardless of the method of the alien's admission").

By contrast, the Third Circuit in *Bamidele* concluded that "the running of the limitation period bars the rescission of * * * permanent resident status and, in the absence of the commission of any other

offense, thereby bars initiation of deportation proceedings." 99 F.3d at 563. In *Garcia*, the Third Circuit held that the 1997 amendment cited in the opinion below "does not invalidate nor modify nor refer in any respect to the statutory language 'within five years' after the adjustment." 553 F.3d at 728. Rather, the amendment's text included only "two clear provisions," which allowed removal without rescission and permitted automatic rescission upon the entry of a removal order. *Ibid.*

The Eighth and Third Circuits have, in fact, expressly recognized the existence of this irreconcilable conflict. See Pet. 7a; *Garcia*, 553 F.3d at 728; *Bamidele*, 99 F.3d at 563 & n.8. But the confusion among the circuits on this question does not stop there.

The Fourth Circuit has taken a third approach. In *Asika*, that court held that Section 1256 "provides no express guidance whatsoever on the * * * question of whether the five-year limitation on rescission actions must also apply to deportation actions." 362 F.3d at 269. As such, although the Fourth Circuit believed that the Third Circuit's reading possessed "some force," it held that "the statute does not speak unambiguously to the precise question at issue." *Id.* at 270.[2]

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[2] In reaching this impasse, the circuit courts have disagreed whether applying the five-year limitations period only to pure rescission actions comports with the principal that statutes must be construed to give effect to all of their provisions. The Third Circuit has held that failing to apply the limitations period in circumstances like Mr. Kim's would "construe the limitations period] out of existence." *Bamidele*, 99 F.3d at 564. The Fourth Circuit rejected this reading of the statute, reasoning that the limitations period provides "an important safeguard to

The circuits have, in other words, variously held (1) that the limitations period in Section 1256 applies to removal actions based on prior ineligibility for status adjustments, (2) that the statutory language compels the opposite conclusion, and (3) that the language is ambiguous. Thus, among the four circuits to decide the issue, all three realistically conceivable positions on the meaning of the statute have been taken.

Further, the question whether Section 1256 ever applies to removal actions promises to endure absent this Court's intervention. Situations potentially implicating the five-year limitations period arise not only when a rogue INS agent accepts bribes, but also in cases of actual "fraud" on the part of the applicant and in cases of agency "error." *Savoury* v. *Att'y Gen.*, 449 F.3d 1307, 1316 (11th Cir. 2006). Indeed, at least three other circuits have been presented with factually similar suits that could have, but did not, raise the issue of the applicability of Section 1256. See, *e.g.*, *Omar* v. *INS*, 266 Fed. Appx. 37 (2d Cir. 2008) (confronting a situation in which an alien given LPR status more than five years previously was ordered removed because he was ineligible for the status at that time); *Savoury*, 449 F.3d 1307 (same); *Sanchez* v. *Winfrey*, 134 Fed. Appx. 720 (5th Cir. 2005) (same). The Third and Ninth Circuits also repeatedly have been confronted with cases presenting similar facts. See Pet. 18 n.7. The time is thus ripe for this Court to resolve the question.

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aliens," because "rescission proceedings"—unlike "deportation proceedings"—give aliens "few, if any, procedural protections." *Asika*, 362 F.3d at 270.

B. The Courts Of Appeals Also Have Inconsistently Applied *Chevron* And The Rule Of Lenity When Reviewing Agency Interpretations Of The INA.

The Eighth Circuit's decision also exacerbates a second split that exists among the circuits. This split concerns whether or not agency determinations of purely legal questions—such as the construction of a statute of limitations—deserve *Chevron* deference.

In *Chevron*, of course, this Court formulated a two-step test for determining whether to defer to an agency's interpretation of a statute whose meaning is contested. The first step requires that courts use "traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842 & 843 n.9. If not, then courts may proceed to the second step and determine whether the agency's interpretation is "reasonable." *Id.* at 845. If it is, the agency's interpretation must be affirmed.

In holding that the limitations period in Section 1256 applies in removal actions, the Third Circuit determined that "[a] statute of limitations is not a matter within the particular expertise of the INS" but instead presents "a clearly legal issue that courts are better equipped to handle." *Bamidele*, 99 F.3d at 561 (quoting *Dion*, 823 F.2d at 673). Accordingly, the Third Circuit expressly declined to give the INS "any presumption of special expertise" in the interpretation of 8 U.S.C. 1256(a). *Id.* at 562 (quoting *U.S. Dep't of the Navy* v. *Fed. Labor Relations Auth.*, 840 F.2d 1131, 1134 (3d Cir. 1988). The court adhered to this stance in *Garcia*. See 553 F.3d at 727-728.

The Eighth Circuit in this case, by contrast, chose to apply *Chevron* and "defer to the Attorney General's interpretation of the statute" "[t]o the extent there is any doubt as to [its] plain meaning." Pet. 8a-9a. In doing so, the Eighth Circuit leaned heavily on the Fourth Circuit's analysis in *Asika*. That court, in turn, recognized that there was "some force" to the argument that the five-year limitations period should apply to removal claims like Mr. Kim's. 362 F.3d at 270. Nevertheless, it held that this "is not the *only* way in which the Act may be interpreted to give independent effect to [Section 1256(a)]." *Ibid.* (emphasis in original). Because the Fourth Circuit believed that the statute was open to multiple interpretations, it held that its "inquiry under *Chevron* [was] simply to ask whether the Attorney General's position 'is based on a permissible construction of the statute.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

The confusion regarding *Chevron*'s applicability to agency interpretations of the INA runs even deeper, in two ways. First, the conflict reaches cases interpreting provisions of the INA other than the limitations period in Section 1256(a). Whenever a question may be characterized as a pure question of law outside the expertise of Citizenship and Immigration Services, the same question of *Chevron*'s applicability is presented. Unsurprisingly, the courts that have considered the question in other contexts have taken two very different approaches.

The Second Circuit, for example, has held in an INA case that "[b]ecause the issue of whether a limitations period creates a jurisdictional bar to untimely claims is itself a question purely of statutory construction, it fits squarely within the

initial step in the *Chevron* analysis." *Iavorski*, 232 F.3d at 133. There was thus no "danger of venturing into areas of special agency expertise" and no "special deference" was due under *Chevron*. *Ibid.* Similarly, in determining whether a provision of the Antiterrorism and Effective Death Penalty Act applied retroactively, the Tenth Circuit squarely held that "[d]etermining the statute's temporal reach does not involve any special agency expertise." *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1147-1148 (10th Cir. 1999). As such, the court analyzed the issue "without affording any deference to the Attorney General." *Id.* at 1148. The First, Sixth, and Eleventh Circuits likewise have concluded that deference is unwarranted when pure questions of statutory interpretation are at issue. See *Pak* v. *Reno*, 196 F.3d 666, 675 n.10 (6th Cir. 1999); *Mayers* v. *INS*, 175 F.3d 1289, 1302 (11th Cir. 1999); *Goncalves* v. *Reno*, 144 F.3d 110, 127 (1st Cir. 1998).

Like the Fourth and Eighth Circuits, however, the Seventh Circuit has applied *Chevron* deference to numerous questions that arguably are pure matters of law. See, *e.g.*, *Sherifi* v. *INS*, 260 F.3d 737, 740 (7th Cir. 2001) (applying *Chevron* to BIA's position on the retroactive application of an amendment to the INA); *Henry* v. *INS*, 8 F.3d 426, 434 (7th Cir. 1993) (applying *Chevron* to BIA's interpretation of the statutory requirements for a waiver of deportation).

The circuit split over the application of *Chevron* therefore goes well beyond the Section 1256 context to infect many issues decided under the INA. In particular, the courts have directly divided on the question whether to defer to the agency's determination that particular INA provisions are or

are not retroactive. Compare, *e.g.*, *Pak*, 196 F.3d at 675 n.10 (no *Chevron* deference), *Jurado-Gutierrez*, 190 F.3d at 1148, and *Goncalves*, 144 F.3d 110 (no *Chevron* deference), with *Sherifi*, 260 F.3d at 740 (affording *Chevron* deference). To take another example, the BIA frequently is required to decide whether a particular criminal offense constitutes an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43). The Tenth Circuit has held that such determinations are entitled to *Chevron* deference, *Tapia Garcia* v. *INS*, 237 F.3d 1216, 1221 (10th Cir. 2001), while the Third Circuit has reached the opposite conclusion, *Patel* v. *Ashcroft*, 294 F.3d 465, 467 (3d Cir. 2002).

Both of these approaches to *Chevron* actually trace to a common source—this Court's opinion in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987). There, this Court held that whether the "well-founded fear" standard for asylum in 8 U.S.C. 1158(a) and the "clear probability" standard for withholding of deportation in 8 U.S.C. 1253(h) were identical was a "pure question of statutory construction for the courts to decide." *Id.* at 445-446; see also, *e.g.*, *Goncalves*, 144 F.3d at 127 (quoting this language). *Cardoza-Fonseca* also reiterated, however, that *Chevron* deference is appropriate when a court is confronted with a "question of interpretation * * * in which the agency is required to apply * * * standards to a particular set of facts." 480 U.S. at 448.

The split over the appropriateness of *Chevron* deference in INA cases presenting pure questions of law also is deep in a substantive sense. If the INS brings a removal proceeding against an alien and the immigration judge refuses to order removal, the agency's usual recourse is to appeal to the BIA and

then petition the Attorney General. See 8 C.F.R. 3.1(h)(1)(i)-(iii). As a result, only aliens typically appeal to a federal court. Almost all deportation cases that reach the federal courts, therefore, involve an agency determination that interprets the INA contrary to the alien's interest. As such, deference to the agency's view under *Chevron* in INA cases almost uniformly leads to interpretations of the statute that run directly counter to the alien's interests. Courts that decline to apply *Chevron* deference in the INA context, on the other hand, will apply the full panoply of interpretive tools when presented with a question of law that falls fully within the province of the courts.

While this much is true in many administrative cases, the question of whether *Chevron* deference is warranted is particularly important in the INA context, because a presumption in favor of the alien otherwise would apply. As this Court first articulated over sixty years ago, the rule of lenity applies in INA cases "because deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). As such, when the immigration laws are of uncertain meaning, those "doubts" are "resolve[d] * * * in favor of" the alien. *Ibid.* The rule of lenity has, in fact, become a staple of this Court's INA jurisprudence when it interprets statutes that can lead to deportation or criminal penalties. See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001); *Cardoza-Fonseca*, 480 U.S. at 449; *INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964); *Bonetti* v. *Rogers*, 356 U.S. 691, 699 (1958).

Thus, both *Chevron* deference and the rule of lenity are deeply embedded in this Court's jurisprudence. This Court's post-*Chevron* immigration cases also are consistent: The Court has twice declined to defer to the agency's statutory interpretation and cited the rule of lenity in both decisions, which involved the purely legal questions of retroactivity and the potential equivalence of two standards. See *St. Cyr*, 533 U.S. 289; *Cardoza-Fonseca*, 480 U.S. 421. In a third case, which involved the question of whether particular factors had to be weighed in making a deportation decision and therefore did not present a pure question of law, the Court held that the BIA's interpretation was entitled to *Chevron* deference and made no mention of the rule of lenity. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999). But even as this Court's cases have been consistent, its guidance to the lower courts has been restricted to the sentences of *Cardoza-Fonseca* quoted above, and the lower courts have not reached a consensus.

Thus, in cases presenting pure questions of law, the circuit courts currently see a choice between competing interpretive presumptions that are almost certain to lead to contrary results. As the Second Circuit put it, on the one hand, "[l]ingering ambiguities in a statute concerning the forfeiture of residence in this country should be resolved in favor of the alien." *Ali* v. *Reno*, 22 F.3d 442, 446 (2d Cir. 1994) (internal citations omitted). But "[o]n the other hand, a court will accord substantial deference to an agency's construction of regulations * * * ." *Ibid.* (internal citations omitted).

The circuits have not reached a uniform reconciliation of these competing principles in immigration cases. See, *e.g.*, *Rosario* v. *INS*, 962

F.2d 220 (2d Cir. 1992) (applying *Chevron* to the agency's interpretation of the statutory requirements for relief from deportation, but rejecting that interpretation based in part on the rule of lenity); *De Osorio* v. *INS*, 10 F.3d 1034, 1036 (4th Cir. 1993) (applying both *Chevron* and the rule of lenity, and upholding the agency's view regarding the retroactivity of an amendment to the INA); *Omar* v. *INS*, 298 F.3d 710, 715-716 (8th Cir. 2002), *overruled in part on other grounds by Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) (holding that *Chevron* did not apply but omitting to consider rule of lenity in upholding BIA's determination that immigrant's criminal conviction constituted an "aggravated felony"); *Naderpour* v. *INS*, 52 F.3d 731 (8th Cir. 1995) (applying rule of lenity and concluding that appeal to BIA was timely, without considering whether agency's interpretation of the applicable rules was entitled to *Chevron* deference).

The Court can bring much needed clarity to this area of the law by granting the petition and confirming, on the one hand, that *Chevron* does not apply to agency interpretations involving pure questions of law, while on the other hand, the rule of lenity requires that ambiguous provisions of the INA be construed in the manner favoring the immigrant, particularly when the provision in controversy may lead to deportation.

II. The Petition Raises Important And Recurring Issues That, If Resolved By This Court, Will Promote Fairness And Consistency In The Application Of The Immigration Laws.

While any conflict among the courts of appeals on a matter of federal law is a matter for concern,

certiorari review is particularly appropriate where the circuits are squarely at odds regarding the application of the nation's immigration laws. Such a split provides conflicting guidance to the BIA about whether particular interpretations of the immigration laws will be upheld on appeal. Because courts of appeals disagree on whether a five-year statute of limitations applies to removal proceedings brought against a legal permanent resident on grounds that he or she was not eligible for an adjustment of status, the BIA presently is confronted with contradictory authority on the same rule of law.

Moreover, the Constitution requires Congress to implement a "uniform rule of naturalization." U.S. Const. art. I, § 8, cl. 4; see also *Graham* v. *Richardson*, 403 U.S. 365, 382 (1971) (acknowledging that the Naturalization Clause imposes an "explicit constitutional requirement of uniformity" in the execution of "laws on the subject of citizenship"); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 537 (2001) (arguing that the Constitution permits Congress to exercise the immigration power "only in a manner that is geographically consistent across the nation"). Disagreement regarding the proper interpretation of Section 1256(a), the applicability of *Chevron* to provisions of the INA that raise purely legal questions, and how to reconcile the rule of lenity with *Chevron* deference has resulted in serious confusion in the lower courts and dramatic variation in the administration of the Nation's immigration laws.

A certiorari grant is especially appropriate in this case for two further reasons. First, the issue of

whether *Chevron* deference is warranted in cases presenting pure questions of law under the INA is especially deserving of this Court's time because it is clear that, as a general matter, many of the stewards of the country's immigration system are not deserving of judicial deference. As Judge Posner unhappily observed, the "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice" and, as a result, the Seventh Circuit reverses the BIA about 40% of the time. *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). It understates the issue to say that Judge Posner's view is widely shared.[3]

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[3] See *Bah* v. *Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) ("[W]e are deeply disturbed by what we perceive to be fairly obvious errors in the agency's application of its own regulatory framework. Congress has entrusted the agency with the weighty and consequential task of granting safe harbor to the deserving of those who flee to this country for protection. The claims of the petitioners before us, as set forth below, did not receive the type of careful analysis they were due"); *N'Diom* v. *Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (observing "the significantly increasing rate at which adjudication lacking in reason, logic, and effort" reaches the federal courts); *Ming Shi Xue* v. *BIA*, 439 F.3d 111, 114 (2d Cir. 2006) ("[T]he position of overburdened immigration judges and overworked courts has become a matter of wide concern."); *Chen* v. *Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (finding that the Immigration Judge's holding was "grounded solely on speculation and conjecture"); *Wang* v. *Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."); *Fiadjoe* v. *Att'y Gen.*, 411 F.3d 135, 154-55 (3d Cir. 2005) (noting the IJ's "hostile" and "extraordinarily abusive" behavior toward petitioner "by itself would require a rejection of his credibility finding"); *Korytnyuk* v. *Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the IJ's con-

Second, as this Court repeatedly has recognized, deportation is a severe punishment with far-reaching consequences. See, *e.g.*, *Cardoza-Fonseca*, 480 U.S. at 449 ("[D]eportation is always a harsh measure."); *Ng Fung Ho*, 259 U.S. at 284 (deportation may "result * * * in loss of both property and life, or of all that makes life worth living"). This is particularly true for legal permanent residents who have enjoyed LPR status for more than five years. By that point, permanent residents, like Mr. Kim, have developed deep ties of work, family, and friendship that make deportation an exceptionally harsh sanction. This is even more true when—as in the case of Mr. Kim—the government rescinds LPR status and initiates deportation proceedings for reasons completely unrelated to any misconduct by the alien.

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clusion, not [the petitioner's] testimony, that 'strains credulity'"); *Ssali* v. *Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("This very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Kourski* v. *Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004) ("There is a gaping hole in the reasoning of the board and the immigration judge."); *Elias* v. *Gonzales*, 490 F.3d 444, 452 (6th Cir. 2007) (noting that the IJ's "intemperate" manner and sarcasm with petitioner "raised substantial questions as to his bias and hostility toward" the asylum applicant); *Sholla* v. *Gonzales*, 492 F.3d 946, 952 (8th Cir. 2007) (IJ denied asylum even though "the record compels any reasonable factfinder to conclude that [the applicant] suffered past persecution on a protected ground"); *Mece* v. *Gonzales*, 415 F.3d 562, 572 (6th Cir. 2005) ("The Board's failure to find clear error in the immigration judge's adverse credibility determination leaves us, we are frank to say, more than a little puzzled."); *Iao* v. *Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005) ("The immigration judge's opinion cannot be regarded as reasoned."); *Recinos de Leon* v. *Gonzales*, 400 F.3d 1185, 1189 (9th Cir. 2005) ("[I]t is impossible for us to decipher what legal and factual reasons support the IJ's decision.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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